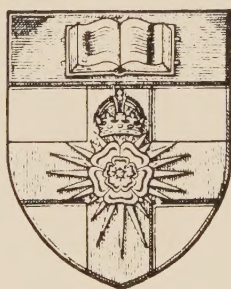


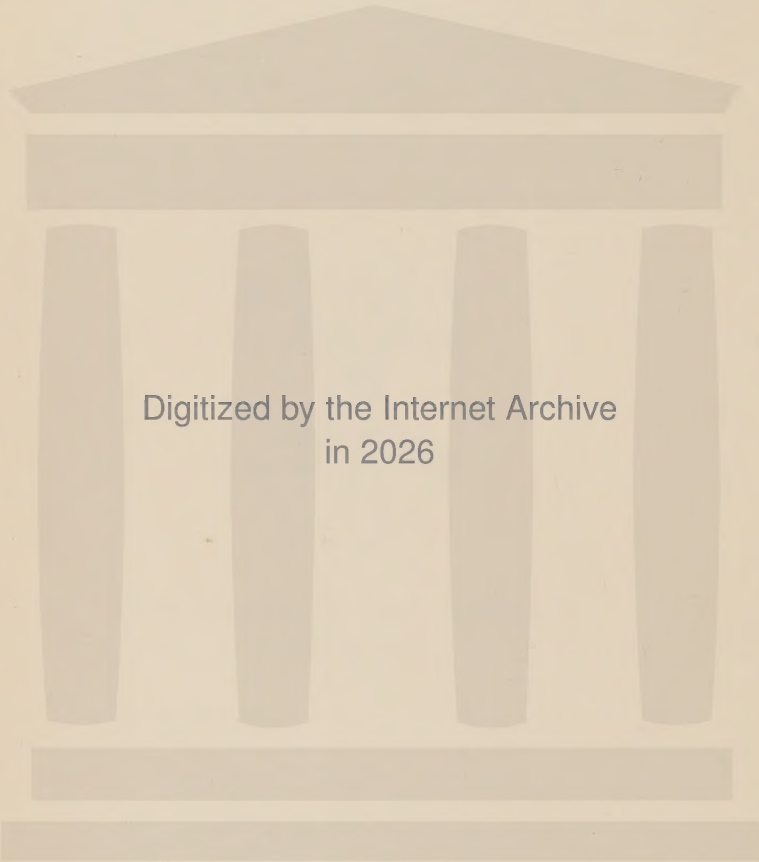
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THE
LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

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AND
PEERAGE CASES.

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THE
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ERRATA

[1945] A. C., at title pages. Between the names of The Right Hon. Sir Donald Somervell, K.C., M.P., and Sir Hartley Shawcross, K.C., M.P., Attorneys-General read "Sir David Maxwell Fyfe, K.C., M.P. (appointed May 29th, 1945)."

Between the names of Sir David Maxwell Fyfe, K.C., M.P., and Sir Frank Soskice, K.C., M.P., Solicitors-General read "Sir Walter Monckton, K.C., K.C.V.O. (appointed May 29th, 1945)."

[1945] A. C., at p. 252, line 5. For "going to see" read "going to sea."

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

INLAND REVENUE COMMISSIONERS . APPELLANTS H. L. (Sc.)*

AND

COOK RESPONDENT.

1945

May 7, 10;
July 30.

Revenue—Income tax—Bequest of tax-free annuity—Payment in full out of sums already subjected to tax—Annuitant without other income—Repayment claim—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), r. 19.

A testatrix bequeathed an annuity of 100*l.* " free of all deductions " including income tax " to the respondent to whom the annuity was paid by the trustees of the will out of income that had been brought into charge to tax. In the year ending April 5, 1940, the gross amount of the payment was 153*l.* 16*s.* 11*d.*, the balance after payment of the annuity being income tax accounted for to the Inland Revenue. The respondent, who had no other income, lodged a claim for repayment of 47*l.* 11*s.* 4*d.* tax, but the inspector of taxes, having learnt that she intended to hand over the returned tax to the trustees, disallowed the claim :—

Held (per Viscount Maugham, Lord Thankerton and Lord Porter, Lord Russell of Killowen and Lord Simonds dissenting), that the respondent was entitled to the repayment which she claimed, inasmuch as the sum of 53*l.* 16*s.* 11*d.* having been deducted at source, must be dealt with as if it had been paid by the respondent herself, and that the Inland Revenue had no concern how the sum repaid to the respondent was applied by her.

**Present :* VISCOUNT MAUGHAM, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD PORTER and LORD SIMONDS.

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Decision of the First Division of the Court of Session, 1944 S. C. 286, affirmed.

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APPEAL from the First Division of the Court of Session.

The facts, set out by VISCOUNT MAUGHAM, LORD THANKERTON and LORD SIMONDS, were as follows: The respondent, Miss Minnie Cook, was entitled under the trust disposition and settlement of her aunt, Miss Margaret Jessie Cook, who died on September 24, 1937, to an annuity at the rate of 100*l.* a year. By the third purpose of her trust disposition and settlement the testatrix directed her trustees "out of the free annual income derived from the heritable subjects which belong to me at the time of my death to pay to my nephew Harold Hope Cook presently a patient at New Saughton Hall, Polton, Midlothian, an annuity or yearly sum at the rate of 150*l.* per annum for the remainder of his life after my decease and to my niece Miss Minnie Cook, residing at 7 Annandale Street, Edinburgh, an annuity or yearly sum at the rate of 100*l.* per annum for the remainder of her life after my decease both of which annuities shall be payable at two terms in the year Whitsunday and Martinmas beginning at the first of these terms after my death with the proportion for the period from my death to that term and so forth thereafter at the said two terms: declaring that the said annuities (1.) shall be purely alimentary and not capable of anticipation or subject to the debts or deeds of the said Harold Hope Cook and Miss Minnie Cook or liable to the diligence of their respective creditors and (2.) shall be payable free of all deductions including income tax and government duty" Accordingly at each term of Whitsunday and Martinmas after the death of the testatrix the trustees paid the sum of 50*l.* to the respondent in respect of the annuity and, when making payment, gave her by their solicitors a certificate appropriate to the standard rate of tax current at the time. She had during those years no other income. The annuity was paid wholly out of income that had already been brought into charge to tax, and included in the sum brought into charge for the year in question, ending April 5, 1940, was a gross sum of 153*l.* 16*s.* 11*d.*, of which 100*l.* was paid to the respondent and 53*l.* 16*s.* 11*d.*, being income tax on the gross sum at the standard rate then in force (7*s.* in the pound) was accounted for to the Inland Revenue.

The certificate granted for the year in question, in form

similar to those given in the previous years, was in the following terms : H. L. (Sc.)

" I hereby certify that Miss Minnie Cook of 41 Colinton Mains Grove, Oxfords, Edinburgh, is a beneficiary of the trust known as Mrs. J. M. Forrest's Trust to the extent of 100*l.* and that the following particulars are correct.

" Information regarding this trust has been or will be furnished to H.M. Inspector of Taxes, 1st Edinburgh Districts

" Signature of Trustee (or { Cooper & Brodie.

" authorised Agent for the { Address :—

" Trust) { 10, Castle Street, Edinburgh.

" Date—3rd January, 1940.

" Income for the year ended 5th April, 1940.

Gross Amount on which tax has been suffered by the beneficiary	Amount of Income Tax suffered thereon by the beneficiary	Amount of the net payment actually made to or for the benefit of the beneficiary
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" 153 <i>l.</i> 16 <i>s.</i> 11 <i>d.</i>	53 <i>l.</i> 16 <i>s.</i> 11 <i>d.</i>	100 <i>l.</i> "
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The respondent, as in the previous years, had no income beyond the annuity in the year ending April 5, 1940. In that year exemption from payment of income tax was fixed at 125*l.* (Finance Act, 1935, s. 19, sub-s. 1.) Prior to that year the respondent had made claims for repayment of the income tax shown by the certificates to have been deducted and retained by the trustees, and she received payment in accordance with these claims and handed the amount of the repayment to the trustees. On January 2, 1940, the respondent lodged with the inspector of taxes a claim for the repayment of income tax for the year to April 5, 1940. That claim showed the respondent's total income from all sources as follows :—

" Source of income.	Amount of income before deduction of tax.	Amount of Income Tax deducted.
" Annuity of £100 per annum		
" free of tax from Mrs. M.		
" J. Forrest's Trust.	£153 16 11	£53 16 11."

The repayment claim form showed that there were no charges on the respondent's income and repayment of 47*l.* 11*s.* 4*d.* of tax was claimed. That sum was made up as follows :—

(a) a personal allowance of tax at the full standard rate of 7 <i>s.</i> on 100 <i>l.</i>	35 <i>l.</i> 0 0
(b) an allowance of two-thirds of tax at the standard rate of 53 <i>l.</i> 16 <i>s.</i> 11 <i>d.</i>	12 <i>l.</i> 11 4
	47 <i>l.</i> 11 4

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Along with the claim the respondent lodged the certificate already referred to. The allowances claimed had nowhere been taken into account. When the respondent lodged her claim for repayment for that year, the inspector of taxes learned that the respondent was prepared and intended, if she was repaid the sum of 47*l.* 11*s.* 4*d.*, to hand it over to the trustees for the behoof of whom it might concern. Previously she had in fact handed over the returned tax to the trustees and accordingly retained for her own use only the net sum of 100*l.* The inspector of taxes refused to allow her claim for 47*l.* 11*s.* 4*d.* He was prepared to concede as a matter of grace, if not of right, the repayment of 35*l.* (i.e., 7*s.* in the pound on 100*l.*), on the footing that the trustees might, if they had thought fit, have paid to the respondent 65*l.* and given her a certificate of deduction of tax amounting to 35*l.*, on which she could have obtained repayment. This the respondent would not accept and appealed to the Commissioners for the General Purposes of the Income Tax for the Division of Edinburgh who, by a majority, allowed the appeal and at the request of the appellants stated a case for the opinion of the Court of Session under s. 149 of the Income Tax Act, 1918, in which the question of law was stated to be whether the majority of the Commissioners was right. The First Division of the Court of Session, as the Court of Exchequer in Scotland, unanimously dismissed the appeal. The appellants appealed to the House of Lords. The trustees were not parties to any of these proceedings.

Reid K.C. (Lord Advocate), J. H. Stamp, R. P. Hills and J. F. Gordon Thomson (of the Scottish Bar) for the appellants. The respondent can claim repayment of income tax on the footing that it is tax paid or suffered by her in respect of what is her income and not otherwise. Such a claim is personal to the claimant. The words "has paid any tax by deduction "or otherwise," in s. 29 of the Income Tax Act, 1918, as amended by the Finance Act, 1920, s. 32, import that such a claim is only valid on the footing that on repayment the sum received belongs to the claimant, who is entitled to retain it. The claimant must be claiming on behalf of himself or a principal, not on behalf of a third party. If the respondent is bound under the terms of the trust to make any repayment to the trustees the amount in question cannot be regarded as part of her income and any tax paid or suffered in respect of it was not paid by her or on her behalf or suffered in respect of any

part of her income. Since this annuity was tax free, the respondent has suffered no loss of income; it is the trustees who are out of pocket. The repayment by the respondent to the trustees of the tax recovered was an adjustment as between herself and them. She was returning an over-payment, something more than was necessary to fulfil the wishes of the testatrix. The duty to pass on any amount repaid disqualifies the respondent from receiving it and she cannot make a valid claim for repayment. The answer to the problem in this case entirely depends on the question: What is the respondent's income? The words "free of all deductions including income tax and government duty" do not on their true construction provide for an annuity of such sum as after deduction at the standard rate leaves 100*l.* a year. They mean that if the respondent is liable to income tax in respect of the sum specified that tax shall be defrayed by the trustees so that the sum of 100*l.* net shall remain in her hands. The intention of the testatrix was that after all questions with the revenue had been settled 100*l.* should remain to the respondent. There is no indication of any intention that she should have more. The gift was of the annuity and nothing else, not of 153*l.* 16*s.* 11*d.* Since the total income of the respondent was below the exemption limit of 125*l.* fixed by the Finance Act, 1935, s. 19, sub-s. 1, the additional benefit conferred by the testatrix had no pecuniary value for her. The tax paid was not her tax in the sense that it was not tax to which she was finally liable. The view contended for by the respondent would cause great confusion if an attempt were made to apply it in practice. [They referred to *In re Pettit. Le Fevre v. Pettit* (1); *Hunter's Trustees v. Mitchell* (2); *In re Reckitt. Reckitt v. Reckitt* (3); *In re Jones. Jones v. Jones* (4); *Richmond's Trustees v. Richmond* (5); *In re Kingcome. Hickley v. Kingcome* (6); *Milne's Trustees v. Milne* (7); *In re Eves. Midland Bank Executor and Trustee Co., Ltd. v. Eves* (8); *In re Maclellan. Few v. Byrne* (9); *Rowan's Trustees v. Richmond* (10); *In re Tatham. National Bank, Ltd. v. Mackenzie* (11); *In re Williams. Midland Bank Executor and*

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(1) [1922] 2 Ch. 765, 770.

(2) 1930 S. C. 978, 982, 983.

(3) [1932] 2 Ch. 144, 153.

(4) [1933] Ch. 842.

(5) 1935 S. C. 585.

(6) [1936] Ch. 566.

(7) 1936 S. C. 706.

(8) [1939] Ch. 969.

(9) [1939] Ch. 750.

(10) 1940 S. C. 30.

(11) [1945] Ch. 34.

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Trustee Co., Ltd. v. Williams (1).] The Crown is prepared in this case to make an ex gratia repayment to the respondent of 35*l.*, because if the trustees had adopted the procedure laid down by r. 19 of the Income Tax Act, 1918, they would have paid her 65*l.* and given her a certificate of deduction of tax for 35*l.*, the standard rate of tax being seven shillings in the pound. She would have been bound to accept payment in that form and she could then have recovered the 35*l.* from the appellants. Though the trustees did not adopt this procedure, the appellants are prepared to treat the case as one in which this was done, on the footing that the respondent will hand over to the trustees the 35*l.* repaid to her to replace the sum in excess of 65*l.* formerly paid by them to her, when in effect they provided her with 35*l.* in advance to meet the tax liability. Moreover, the Crown is prepared to admit a claim by the residuary legatees for a return of the difference between 53*l.* 16*s.* 11*d.* and 35*l.*

Strachan K.C. and *J. Crawford* (both of the Scottish Bar) for the respondent. The respondent was following settled practice in making her claim on the basis of the amount of the annuity plus tax at the standard rate. This has nothing to do with the totally different question what sum she is entitled to draw from the trust, i.e., 100*l.* The trustees, in order to discharge their liability in respect of the annuity of 100*l.* "free of all deductions including income tax," were obliged to treat the annuity in the first instance as being an annuity of the gross sum of 153*l.* 16*s.* 11*d.*, the sum which after the payment of income tax at the standard rate, sufficed to pay the annuity and no more. Accordingly, the respondent was entitled to claim repayment of income tax on the basis of the gross income. For revenue purposes there is no distinction between an annuity of a stated amount "free of all deductions including "income tax" and one of such sum as after deduction of income tax will be equal to the stated amount. Though the respondent is claiming in her own name she is also claiming for the trustees. She can be called on to account to the trustees for the sums recovered. Payment by deduction of the income tax on the amount of the annuity is necessarily payment by someone other than the respondent. In order to adjust the payment the respondent must claim under s. 29 of the Income Tax Act, 1918. The 47*l.* 11*s.* 4*d.* which she claims was received at the expense of the residuary legatees. The amount of tax actually

accounted for to the Inland Revenue by the trustees in respect of the income required to satisfy the annuity exceeded the amount of tax due by the respondent and that excess should be repaid. If the trustees had failed to make the deduction they would have been accountable to the residuary legatees for that amount. As regards the respondents' claim there is no alternative but to proceed on the footing that *In re Pettit* (1) applies to such a case as this. It has long been accepted as correct both in England and Scotland. The reliefs in that case were fixed on the basis for which the respondent contends. It is best to have a straightforward, simple rule such as this. The appellants' argument is artificial, needlessly complicated and divorced from reality. It appears from the Finance Act, 1941, s. 25, that the procedure adopted by the trustees in this case was that which Parliament contemplated in every case of payment of a stated sum free of income tax. They did not know the respondent's position as to reliefs and allowances and, since they could not compel her to tell them, they could not do otherwise than pay her the full nominal amount of the annuity. This is reinforced by the fact that the testatrix directed payment at two terms of the year and presumably in two equal parts. Further, the appellants have no concern, as between the respondent and the trustees, with the manner in which the amounts repaid to her are applied. The adjustment between the respondent and the Inland Revenue is separate from the adjustment between the respondent and the trustees. An alternative view is that if the respondent's income for the purposes of this case is to be taken to be the *root.* annuity only, then the whole of the 53*l.* 16*s.* 11*d.* should be repaid by the Crown.

Reid K.C. (Lord Advocate) replied. [He mentioned an arrangement whereby the respondent would be entitled to her costs of the appeal as between solicitor and client.]

THE HOUSE took time for consideration.

July 30. VISCOUNT MAUGHAM (read by LORD THANKERTON). My Lords, it is not surprising that the Inland Revenue authorities have found it difficult to state the precise grounds on which they rely in contesting the respondent's claim. Abandoning the arguments they put forward before the commissioners, the two main contentions which they supported

(1) [1922] 2 Ch. 765.

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(as amended) in the Court of Session are thus stated by the learned President (1): "Either the respondent, being entitled to an annuity of 100*l.* plus income tax, if any, due by her in respect thereof, and being exempted from all liability to income tax, is not entitled to any repayment; or the proper method of dealing with her annuity and income tax, so far as the trustees were concerned, was that they should have tendered to her two sums amounting together to 65*l.* per annum, in equal parts at Whitsunday and Martinmas, and a certificate showing that 35*l.* had been paid by way of income tax in respect of the annuity so as to enable the respondent to recover 35*l.*" The appellants, however, have now made an ex gratia offer to repay, not the sum of 47*l.* 16*s.* 11*d.*, but the sum of 35*l.* They submitted in their case that some confusion had been introduced into the appeal by this offer, and I am tempted to agree with this view. Their explanation of the offer is as follows: The appellants are prepared to make this ex gratia payment because the whole of the trust income having borne tax, the total available for distribution among the beneficiaries was diminished thereby. If the trustees had followed the procedure laid down in r. 19 of the Income Tax Act, 1918, they would have paid the respondent not 100*l.* in cash but 65*l.* in cash and given her a certificate of deduction of tax for 35*l.* This latter sum she could have recovered from the appellants, and she would then have had 100*l.* in her hands. The trustees did not follow this procedure, but the appellants are prepared to treat the case as one in which that procedure had been followed and to repay her 35*l.* on the assumption that she would hand it over to the trustees to replace the excess of 35*l.* formerly paid by them to her. This, it will be noted, implicitly reasserts the proposition that the Income Tax Acts make it illegal to pay an annuitant the amount of the annuity payable free from income tax at the dates specified in the will, which in my opinion would be an unhappy conclusion. I will explain later why I think it is incorrect. I cannot deal with the above contentions of the Inland Revenue in better language than that used by the Lord President. He said (2): "I think that the first duty which lay upon the trustees, who were not embarrassed by an insufficiency of funds, was to obey the express instructions of the will and to pay directly to the respondent 50*l.* at Whitsunday and 50*l.* at Martinmas, 100*l.* per annum in all. It would have been

(1) 1944 S. C. 286, 292.

(2) Ibid. 295.

"contrary to the terms of the will, and a breach of trust, if they had paid only 65*l.* and had accompanied that payment with a certificate that 35*l.* had been paid by way of tax. Moreover, I think that such a proceeding would have been contrary to the provisions of the Income Tax Acts, and that it would have been without legal warrant. That disposes of one of the alternative contentions of the Crown before the Commissioners, although that alternative was not the one supported before us by counsel for the Inland Revenue."

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I will give reasons for agreeing with this view. In the form of the ex gratia offer the alternative in question seems still to be supported; but for the reason given by the Lord President the course suggested in the offer seems to me to be inadmissible. The first alternative, however, has been further amended and is now framed in these terms: (1.) The appellants contend that the total of the respondent's annuity for the year in question was 100*l.*: that the additional benefit under the trust disposition and settlement to receive that annuity free of all deductions including income tax did not have any pecuniary value in that her total income was below the exemption limit of 125*l.* fixed by the Finance Act, 1935, s. 19, sub-s. 1, and that, as she admitted she intended to pass on the recovered tax to the trustees to be used for other trust purposes, that tax could not properly be treated as an addition to her annuity of 100*l.* (2.) If the respondent's income for the year in question was 100*l.* the appellants maintain (1.) that she cannot claim any repayment at all, or (2.) that in any event she can only claim repayment of tax at the standard rate on the sum of 100*l.* When the appeal came before your Lordships the Lord Advocate on behalf of the Inland Revenue made a fresh and final offer or statement which took Mr. Strachan, who appeared for the respondent, by surprise. As I understood the Lord Advocate, he said that the Inland Revenue were prepared to admit a claim by the residuary legatees under the will for a return of the difference between 53*l.* 16*s.* 11*d.* and the sum of 35*l.* which had been offered to the respondent. The effect, as I understand it, would be, if both offers were accepted, that the Inland Revenue would gain nothing at the end of the day except perhaps some small amounts for interest. I think, whatever view your Lordships may take of these tempting offers, we are left in our judicial capacity with the task of deciding the legal rights of the subject in a case depending on a number of rather obscure sections and rules of the Income Tax Acts. One thing,

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however, is in my opinion clear, and that is that the duty of the trustees was to comply with the directions contained in the will according to their true interpretation, unless indeed there was some illegality involved in them.

My Lords, the first thing then to determine in this case is the true construction of the clause in the will. In the interests of brevity I shall confine myself to the respondent's annuity. It is described as an annuity at the rate of 100*l.* per annum for her life, payable in two terms in the year, Whitsunday and Martinmas; it is to be alimentary and not capable of anticipation, and is to be payable "free from all deductions including "income tax and government duty." Gifts by will of annuities free from income tax have been common both in Scotland and England for many years, and have given rise to a large number of reported decisions. At an early stage there was a little hesitation in dealing with them, for it was and is apparent that a named annual sum cannot literally be given free from income tax, since the annuitant must normally pay income tax on his or her income, and what is sometimes called a benevolent construction had to be applied if the plain intention of the will was to be carried out. That intention could be achieved by the simple means of holding that the testator must have intended to give, in addition to the fixed annuity, such a sum as would enable the trustees in each year to discharge the income tax on the total amount of the fixed annuity and the additional sum and to pay the balance which in the normal case would be the exact amount of the stated annuity to the annuitant. Unless there is something special in the language of the will, which prevented that construction being adopted, that became the recognized construction in cases of gifts of annuities of fixed amounts free of income tax both in England and Scotland. In the case of *Hunter's Trustees v. Mitchell* (1), Lord Sands observed as follows: "When under a will an annuity is payable free of income tax, the amount of tax is taken to be an "additional gift, and is included in the income of the annuitant "when, for revenue purposes, a return of total income is "necessary. Further the income from the annuity is not the "annuity plus the tax upon it, but the amount of the annuity "plus such sum that, when the tax is levied upon the total "amount, the net amount left will be the amount of the "annuity." This is a perfectly correct statement of what has long been the settled rule of construction in a case which

(1) 1930 S. C. 978, 982.

presents no special features capable of leading to the conclusion that the application of the rule would involve a departure from the true intention of the testator. The rule, where it is properly applied, is in my opinion a fair and just one. It carries out the intention of the testator. It has been applied in very numerous cases, and it is far too late to challenge it to-day. It is clear that it applies in the present case. I will only add that under the rule what is treated as being given to the annuitant is given, to use the language of that eminent judge the late Lord Fleming (1), in two annual constituents. The one is the annuity of 100*l.*, the other is "just an addition to the gift of 100*l.*" to enable the trustees to comply with the direction to pay that annuity free from income tax, and it "became in law "part of her income." No difficulty usually arose in early days, when income tax was at a very low rate, in applying the rule, for questions as to abatement, exemption and so forth seem to have been easily settled, and super-tax with all its problems had not been invented. Without going into details as regards these matters it is easy to see that they make it impossible to ascertain at the beginning of any year what further income an annuitant may receive during that year and what abatements and deductions he might become entitled to. For instance, he may earn or lose other income. He may marry. A child may be born to him, or may die. All these events may happen during the year. Nor have trustees either a duty or a right to make inquiries on these matters. The legislature had anticipated these possibilities and had provided by r. 19, sub-r. 1, of the All Schedules Rules as amended by the Finance Act, 1927, s. 29 (amongst other things) that no assessment should be made upon an annuitant under a deed or will, but that the person liable to make such payment (e.g., the trustees) should be entitled on making such payment to deduct or retain thereout a sum representing the amount of the tax on the annuity at the standard rate for the year in which the annuity payable became due. In the present case the standard rate, seven shillings in the pound on 153*l.* 16*s.* 11*d.*, is equal to 53*l.* 16*s.* 11*d.* and the trustees had therefore to disburse the sum of 153*l.* 16*s.* 11*d.* in order to be able to pay 53*l.* 16*s.* 11*d.* to the Inland Revenue as representing the tax at the standard rate on 153*l.* 16*s.* 11*d.* and to be entitled and liable to pay the annuity of 100*l.* to which the respondent was entitled. It is, I think, immaterial whether the disbursement of 53*l.* 16*s.* 11*d.* was

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(1) 1944 S. C. 286, 295.

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made directly or indirectly by previous deduction to the Inland Revenue. To make the position clear it may be desirable to point out that the amount of the annual benefits given on the true construction of the will to the annuitant was 100*l.* plus the sum which might ultimately prove to be payable by her for income tax for that year, so as to leave 100*l.* for her personal behoof. In other words, the annuity given to her was an amount equal to 100*l.* plus an amount, say *xl.*, varying from year to year and liable to exemptions and abatements. The *xl.* is none the less a constituent of her income because it may vary from year to year and (if payable) has to be paid in discharge of her income tax. The fact that the value of *xl.* is unascertainable until after the end of the year, when the deductions for abatements and exemptions, if any, will be ascertained, does not occasion any practical difficulty. The trustees have only to follow the provision of r. 19 of the All Schedules Rules, the effect of which I have already mentioned. They had therefore to make a provisional calculation on the basis of the standard rate for the year in question on 100*l.* + *xl.*, so that *xl.* is equal to the tax at that rate on 100*l.* + *xl.*. A simple equation may be necessary. In the year in question *xl.* was found to be 53*l.* 16*s.* 11*d.* and 153*l.* 16*s.* 11*d.* was therefore the ascertained total annual benefit of the respondent on the basis of tax at seven shillings in the pound. The 53*l.* 16*s.* 11*d.* was paid to the Inland Revenue under the rule, but with a probable or possible right to a claim for exemption or abatement at the end of the year. The sum was exigible by the revenue not because the tax which would become due by the respondent for income tax for the year in question on 100*l.* was or would necessarily be 53*l.* 16*s.* 11*d.*; but because it was the arbitrary or hypothetical amount fixed by r. 19 and chargeable against the trustees by the terms of that rule on the total sum of 153*l.* 16*s.* 11*d.*. My Lords, I think it is clear that the sum of 53*l.* 16*s.* 11*d.* was an amount of income tax deducted for and on behalf of the respondent as being a sum representing (at seven shillings in the pound) the amount of the tax on both the constituents of her annuity. She it is who makes and who alone could make the claim I have mentioned for the return of tax, 35*l.* for a personal allowance of tax on 100*l.*, and 12*l.* 11*s.* 4*d.* for an allowance of two-thirds of tax on 53*l.* 16*s.* 11*d.*, both at seven shillings in the pound. The total is 47*l.* 11*s.* 4*d.*. The sum of 53*l.* 11*s.* 6*d.* was deducted at the source and it must be dealt with as if it had been paid

by the respondent herself. She contends that the amount of the excess over her true liability for the year was 47*l.* 11*s.* 4*d.* It may be noted that there is a plausible argument for the respondent as the result of which her claim might have been for the total sum of 53*l.* 16*s.* 11*d.* ; but your Lordships are only concerned with a claim for the smaller sum of 47*l.* 11*s.* 4*d.* and that is all I propose to deal with.

My Lords, I am of opinion, for the reasons above stated, that the Inland Revenue must fail in their contention as to the true construction of the gift to the respondent contained in the will. They must also fail in the contention that no income tax was paid by or on behalf of the respondent and that therefore she cannot under s. 29 of the Income Tax Act, 1918 (as amended), claim any repayment. With regard to this contention I take the same view as my noble and learned friend Lord Thankerton takes in his judgment, which I have had the advantage of reading, and I could not improve upon his language. There remains however an argument not, I think, advanced in the Court of Session, based on the circumstance that the respondent does not intend to retain under the will more in any year than the net sum which the will intended her to have and that she accordingly proposes to hand over to the trustees the sum of 47*l.* 11*s.* 4*d.* if and when she recovers it under her claim. It is not in dispute by the Inland Revenue that payment at the source is merely the machinery by which income tax is collected and the rights of the parties are not thereby altered. In my opinion the same proposition is true in regard to the deduction by trustees of income tax under r. 19 at the standard rate for the year in which an annuity such as we are now discussing becomes due. That sum merely represents the amount of the tax at what in many cases is only an arbitrary figure. The rule clearly is not designed to affect or diminish the rights of the poorest class of taxpayers to abatement or exemption. Nor, I think, do counsel for the Inland Revenue now contend for such a result. Looking at the matter broadly, I have been unable to see how the Inland Revenue are concerned with the fact that the respondent does not intend to retain for her own benefit the amount of her claim. They could scarcely have so contended if that claim had been assigned, together with the fixed amount of the annuity (if assignable), to a third party. It is plain that the respondent is the right person to make the claim under s. 29 of the Income Tax Act, 1918 ; it is, I repeat, a personal claim, but I can see nothing in

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the section to prevent her from handing over the amount received to a third party. It is true that according to the well-known decision of Lord Romer (as Romer J.) in the similar case of *In re Pettit*. *Le Fevre v. Pettit* (1), she will be bound to hand over the amount of any sum recovered by her from the Inland Revenue to the trustees for the ultimate benefit of the residuary legatees. The Inland Revenue had there allowed the claim for abatement which they here seek to question, and they have till recently continued that practice. That case has been followed on numerous occasions. To mention only some of them it was approved by the English Court of Appeal in *In re MacLennan. Few v. Byrne* (2), by Lord Sands and Lord Fleming in *Hunter's Trustees v. Mitchell* (3), and by the Lord President in the case of *Rowan's Trustees v. Richmond* (4). It seems to me to be a complete fallacy to say that the annual benefit given by the will is accordingly the fixed sum of 100*l.*, described as "the annuity"; for if that were true she would have to submit to a deduction of seven shillings in the pound on that sum for her supposed income tax and would only receive 65*l.* in the year, with a right in certain events to reclaim 35*l.* at a later date. Those, as pointed out above, are not her rights under the will. The curious thing is that it does not seem to matter to the Inland Revenue whether the respondent hands over the 47*l.* 7*s.* 11*d.* to the trustees because of her ideas of honesty and fair dealing, or because of the principle of construction laid down in *In re Pettit* (1). In either case she will not retain the sum in question. I am unable to detect any logical ground on which the Inland Revenue can refuse to allow her claim to recover what is proved to be an overpayment on her behalf of income tax for the year ending April 5, 1940. As I see it the argument is based on the view that because of the nature of the gift and of events in the year in question the respondent has only been given an annuity of 100*l.*; but this is incorrect. She was given, as I have endeavoured to explain, the chance of receiving and retaining *subject to income tax* the sum of 153*l.* 16*s.* 11*d.* Whatever income accrued to her she would be left with 100*l.* net payable to her by the trustees in accordance with the will.

I should add that the provisions of s. 25 of the Finance Act, 1941, seem to indicate that the procedure adopted by the trustees in the present case is precisely that contemplated by

(1) [1922] 2 Ch. 765.

(2) [1939] Ch. 750.

(3) 1930 S. C. 978, 983, 989.

(4) 1940 S. C. 30, 42.

Parliament in normal cases of payment by trustees of stated annual sums of income free from tax. The case of *In re Jones. Jones v. Jones* (1) has been referred to. There the bequest was given as "such an annuity as after deducting therefrom "income tax at the current rate for the time being would "amount to the clear yearly sum of 350*l.*" Eve J., distinguishing the case of *In re Pettit* (2), held that the annuitant was entitled to such sum as after deduction of tax thereon at the standard rate would leave 350*l.* and was not bound to pay over to the trustees the tax recovered by her. Taking his view that "current rate" meant the same thing as "standard rate" it is not difficult to see that the gift in *In re Pettit* (2) was a very different one. The decision does not affect the present case. It must be noted that the trustees could not themselves apply for a deduction or abatement and the argument that the respondent could not do so either seems to me logically to lead to the result that in such a case the Inland Revenue become entitled (apart from ex gratia concessions) to receive and retain considerably more than the income tax really due from the annuity given tax free and the persons entitled as residuary legatees. The Lord Advocate seems to shrink from this view. So do I; but my conclusion is no more than that the old practice in force for some years before and after the decision of *In re Pettit* (2) was a legal and a correct practice, and that the Inland Revenue have no concern with the question how the sum repaid to the respondent by way of deduction or abatement is applied. My Lords, I agree with the unanimous decision of the First Division and with the reasons given by their Lordships, and I move that the appeal should be dismissed with costs.

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LORD THANKERTON. My Lords, the first question arises on construction of the direction in the will for payment to the respondent out of the free annual income of the heritage held by the trustees of "an annuity or yearly sum at the rate of "100*l.* per annum . . . payable free of all deductions "including income tax and government duty." I do not think that the alimentary restrictions imposed on the annuity affect the decision. We are here concerned with income tax only; no question of surtax arises. In my opinion the meaning of such a bequest is clearly established in the law of Scotland, and I have no reason to think that the law of England is different.

(1) [1933] Ch. 842.

(2) [1922] 2 Ch. 765.

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It is well expressed by Lord Sands in *Hunter's Trustees v. Mitchell* (1). Lord Sands says: "Income tax is a tax upon the income of the person who enjoys the income. In whatever manner it may be collected, its ultimate incidence is upon the income of this person. So rigid is this principle that, when under a will an annuity is payable free of income tax, the amount of the tax is taken to be an additional gift, and is included in the income of the annuitant when, for revenue purposes, a return of total income is necessary. Further, the income from this source is not the annuity plus the tax upon it, but the amount of the annuity plus such sum that, when the tax is levied upon the total amount, the net amount left will be the amount of the annuity." In other words, the duty of the trustees is to provide by means of the additional gift a sum to meet the annuitant's liability for income tax and leave her 100*l.* annuity in her hands unaffected by tax. It is well to remember that, in the case of a taxpayer's source of income which is subjected to deduction at the source either under r. 19 or r. 21 of the General Rules applicable to all Schedules, there are usually two stages in the taxpayer's liability to income tax, namely, first, the taxpayer has to suffer deduction at the source at the standard rate, which is provisional and subject to adjustment at the second stage, when the taxpayer claims and obtains relief by repayment under s. 29 of the Act. Now, the duty of the trustees in a case such as the present is to provide for the liability of the annuitant to tax under the first stage, and it is difficult to see why they are not to get the benefit of the later adjustment to which the provisional discharge of the taxpayer's liability is subject. The additional gift in such a case, either in whole—as in the present case—or in part, serves to meet a temporary tax liability, and, when the tax liability is ultimately ascertained, its service is terminated, and it should be pro tanto returned to the trust estate. This case is in marked contrast to the bequest of such an annuity as after deducting income tax at the current rate (which was held to mean the standard rate) for the time being would amount to the clear yearly sum of 350*l.*; *In re Jones. Jones v. Jones* (2). Such a deduction is not affected by the ultimate tax liability of the annuitant, as ascertained under the second stage. That being the proper construction of the bequest, the next question is as to how the bequest works out in a question with the Revenue. This may well be exemplified

(1) 1930 S. C. 978, 982.

(2) [1933] Ch. 842.

in this case by an assumption that there was no statutory machinery for collection at the source. The annuitant would then be directly assessed on her total income, and there can be no doubt that her total income would be found to be 100*l.*, and she would be exempt from any liability to tax, with the result that the additional gift would become unnecessary in the particular year. But there was in this case statutory provision for deduction at the source, and, as the trust income had already been brought into charge, r. 19 of the General Rules applicable to Schedules A B, C, D and E, as amended by the Finance Act, 1927, s. 39, sub-s. 1, ensured deduction at the source, and entitled the trustees, on making payment of the annuity or other annual payment, "to deduct and retain" thereout a sum representing the amount of the tax thereon "at the [standard rate] for the year in which the amount payable became due. The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid." The standard rate of tax in the year to April 5, 1940, was seven shillings in the pound, and the Crown maintains that the duty of the trustees under this rule, if they made the deduction, was to pay the respondent 65*l.* in cash, and to give her a certificate of deduction of tax showing that 35*l.* had been paid as income tax, and that the respondent was bound to accept payment in that form. I agree with the learned judges of the First Division in their rejection of this contention, and their reasons for so doing.

In the first place, I am of opinion that the trustees, in order to carry out the provisions of the will, were bound to exercise the right conferred by the rule and make the deduction. Secondly, it is established beyond doubt, that the provisions for deduction at the source are nothing more, under the Income Tax Acts, than the machinery by which the Revenue collects the tax from the person ultimately liable to pay. The authorities are referred to by Lord Fleming in *Richmond's Trustees v. Richmond* (1). I may say that I prefer Lord Fleming's dissenting opinion as to the right of the trustees to share in the repayments obtained by the annuitant to the opinions of the majority. Further, it must be remembered that any sum payable under the additional bequest forms part of the total income of the

(1) 1935 S. C. 585, 596.

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annuitant and is thus subject to tax. Under r. 19 the trustees had no choice but had to apply the standard rate to the 100*l.* annuity, and this necessarily involved a calculation of what sum paid under the additional bequest would cover tax at the standard rate on that amount as well as the 100*l.* No one disputes that 153*l.* 16*s.* 11*d.* formed a correct calculation on this basis. The trustees had no call, under this rule, even if they otherwise had a right, to ask the respondent to provide them with particulars as to what her total income was, or as to what personal allowances she might be entitled. But the deduction did involve a payment by the trustees, on her behalf, out of the additional bequest, which beneficially belonged to her, of 53*l.* 16*s.* 11*d.*, being in discharge of the respondent's personal liability for tax. Romer J. in *In re Pettit. Le Fevre v. Pettit* (1), already referred to, in relation to a tax free annuity of 1,000*l.*, puts the matter so clearly as to the stage which I have reached that I venture to quote a passage, viz.: "It would, however, be impossible for the trustees to ascertain what rate of tax was ultimately payable in respect of the annuitant's income, and in any case they would, under the provisions of the Income Tax Acts, be bound, in the first instance, to treat that income as liable to the ordinary rate. In the year 1918-19, for instance, when the ordinary rate of income tax was six shillings in the pound the trustees would have had in the first instance to set aside 1,428*l.* 11*s.* 5*d.* and to pay 428*l.* 11*s.* 5*d.* to the revenue and the balance to the annuitant. But this sum might in the end prove to be too little or too much. If the annuitant were liable to pay super-tax it would be too little and the proper proportion of her super-tax referable to her annuity would, when ascertained, have to be paid to her by the trustees and would so go to reduce the income payable to the residuary legatees. It might on the other hand turn out that the circumstances of the annuitant were such that she was not liable in respect of her income to the full rate of income tax, that, in my opinion being the true effect of the provisions for relief and abatement contained in the relevant taxing Acts. In that case the sum so set aside and the 428*l.* 11*s.* 5*d.* paid in the first instance to the revenue would be too much, and if, in consequence of this, the annuitant is repaid the excess by the Special Commissioners, I cannot understand on what ground it can be suggested that such excess should be retained by the

(1) [1922] 2 Ch. 765, 769, 770.

"annuitant who has not paid it, and not be handed back to the residuary legatees who have. If the annuitant were to retain the excess she would in the end have received out of the estate more than twenty shillings in the pound on the 1,000*l.* given to her by the will." This passage was approved by Lord Sands in *Hunter's Trustees v. Mitchell* (1). The Crown were not parties in that case, and they take exception to it only in so far as the language of Romer J. may be held to be inconsistent with a contention which they have submitted for the first time in this House, and which depends on the proper construction of s. 29 of the Income Tax Act, 1918 (as amended by s. 32 and sch. III. to the Finance Act, 1920), which provides :

"(1.) If it is proved to the satisfaction of the general commissioners that any person whose claim for allowance or deduction or relief has been allowed, has paid any tax, by deduction or otherwise, the general commissioners may, in the form prescribed, certify the facts proved before them to the special commissioners. (2.) The certificate of the general commissioners shall state the particulars of the different sources of income in respect of which tax has been paid, the relief to which the claimant is entitled, the amount repayable in respect thereof, and the name and place of the abode of the claimant. (3.) On receipt of the certificate, the special commissioners shall issue an order for repayment." The contention of the Crown is that the claim for repayment is personal to the claimant, and that the words "has paid any tax, by deduction or otherwise" import that no claim is valid except on the footing that on receipt of the repayment it belongs to the claimant, who is entitled to keep it; that, in the present case, it is the trustees who are out of pocket; that the claimant would be bound to account to the trustees for any repayment recovered by her; and that, accordingly, the respondent's claim for repayment does not fall within the purview of the section. My Lords, in my opinion this contention is untenable, both as regards the narrow construction sought to be put on the section and the proper view of the facts in the present case. The words "paid by deduction" must refer to payment at the source by someone other than the claimant, but someone who thereby has paid the claimant's tax on the claimant's behalf; and that it constitutes payment by the claimant of her tax appears to me to be made clear by the closing words of sub-r. 1 of r. 19--

(1) 1930 S. C. 978, 983.

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“ and the person making such deduction shall be acquitted and “ discharged of so much money as is represented by the “ deduction, as if that sum had been actually paid.” As I have already stated, on the basis of r. 19, the amount of the additional bequest was 53*l.* 16*s.* 11*d.* which belonged to the respondent, and that amount was applied on her behalf by the trustees in payment of 53*l.* 16*s.* 11*d.* of tax. As it turns out now, that calculation was in error as regards the liability of the respondent to income tax to the amount of 53*l.* 16*s.* 11*d.*, which the respondent has paid by deduction within the meaning of s. 29, and it does not seem to me to be any concern of the Crown whether the respondent is to account to the trustees for it or not. Finally, I am unable to see any reason for any reduction of the 53*l.* 16*s.* 11*d.* to 47*l.* 11*s.* 4*d.* The amount overpaid was 53*l.* 16*s.* 11*d.* in respect of the respondent's personal liability to income tax. So far as she is concerned the Crown have no possible ground for claiming any tax out of the 53*l.* 16*s.* 11*d.* Whether, after its return to the trustees, and its distribution to, say, the residuary legatees, it is liable to any tax, is not *hujus loci*. Whether the respondent can amend her claim so as to claim the 53*l.* 16*s.* 11*d.* is not for this House to decide ; we can only deal with the claim as presented to us in the stated case, and, in that view, I am of opinion that the appeal should be dismissed, and that the decision of the First Division should be affirmed. In accordance with the arrangement mentioned by the Lord Advocate, the respondent will be entitled to her costs of the appeal as between solicitor and client.

LORD RUSSELL OF KILLOWEN. My Lords, this appeal raises a question to which I find it difficult to give an answer which satisfies me in every particular. The difficulty arises from the impossibility of making the provisions of the will fit into the provisions of the Income Tax Act, 1918, but the problem must be approached in my opinion from the point of view that the trustees of the will do in each year strictly carry out the trusts imposed upon them by the testator. At the outset my personal difficulty is increased by the fact that, unaided by authority, I would have imagined that the testator meant Miss Cook to receive an annuity of 100*l.* per annum, and that residue was to bear the burden of and recoup her the amount of any tax which she might have to pay in respect of an annuity of 100*l.* It has however been settled by authority (too late, it is said, for

challenge) that the true meaning of such a provision is such that it bequeathes an annuity not of 100*l.* but of such a sum as after deduction of tax will produce in each year the net sum of 100*l.* In other words it is not a bequest of an annuity of *x*l.** the tax on which has to be borne by residue, but a bequest of an annuity of *y*l.** the tax on which is treated as borne by the annuitant by deduction, although in truth the burden of paying the annual sum of *x*l.** tax free to the annuitant falls upon residue. The amount of the annuity given may therefore vary from year to year according as the amount of tax payable by the annuitant increases or diminishes ; and such an increase or diminution may be caused by one or other of several factors, as for instance alteration in the standard rate of tax, or an alteration in the annuitant's rights (by personal or other allowances) to exemption from tax. For, be it observed, the freedom from tax in the case of such a gift as the present is not, as in the very special case of *In re Jones. Jones v. Jones* (1), freedom from tax at the standard rate as a fixed deduction for the purpose of ascertaining the amount of the net annual payment, but freedom from the tax which would otherwise be payable by the particular annuitant.

What are the facts relevant to the particular year here in question, for the only matter for our determination is whether Miss Cook is entitled to recover repayment of tax for the year ending April 5, 1940 ? The facts are as follows :—(1.) the trustees out of the income of the estate, which had already borne tax by deduction, paid to Miss Cook, at the times specified in the will, two sums of 50*l.* each ; (2.) they made no deduction in respect of tax under r. 19 of the General Rules because the terms of the will prohibited any such deduction ; (3.) the two sums of 50*l.* constituted the sole income of Miss Cook ; and (4.) she was therefore not liable to pay income tax at all. Those are the facts of this case, and on a consideration of them I am unable to see how any overpayment of tax has taken place, or how any claim by the annuitant to repayment can arise. She has received exactly what the will gave her, viz., 100*l.*, and has paid no tax. The residue has suffered the reduction of the estate's taxed income contemplated by the will and caused by the direction to pay the 100*l.* The revenue has received all the tax to which it is entitled. My Lords, I am painfully conscious that the solution which I have indicated, commends itself to none of your Lordships ; but, notwith-

(1) [1933] Ch. 842.

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standing the uneasiness to which that fact gives rise, I prefer it to a solution which causes the trustees to depart from the directions given to them by the testatrix, and to a solution which is based on a two-fold fiction, viz., that the income of Miss Minnie Cook during the year in question was 153*l.* 16*s.* 11*d.* and that the trustees had disbursed a sum of 153*l.* 16*s.* 11*d.* out of which they paid to the Revenue income tax at the standard rate. I would allow the appeal.

LORD PORTER. My Lords, in this case I have had an opportunity of reading the opinions of Lord Maugham and Lord Thankerton and agree that the judgment of the First Division of the Court of Session should be affirmed. I should not trouble your Lordships with my own views were it not that the provisions of the various Finance Acts applicable are neither clear nor coherent, and in a matter where some violence to language must be done, whatever view is taken, I think it desirable to state shortly the reasons why I have arrived at the conclusion stated.

Like Lord Maugham I think that the first question is to determine the meaning of the will. I do not think that any of your Lordships have any doubt as to this: the trustees are under an obligation to pay the annuitant 50*l.* at Whitsunday and 50*l.* at Martinmas in each year and the right to payment is to accrue on the first appointed date immediately following the death of the testatrix, subject to a reduction in the first payment so that it shall bear the same proportion to 50*l.* as the period between the death and the date of the first payment bears to the full half year. Whatever recovery of tax she may or may not obtain later, at that moment the annuitant is entitled to the named sum given by the will. No question of a broken period arises in the present case so that the named sum is on each date 50*l.* and for the year 100*l.* The trustees are not entitled—and indeed it has not been maintained that they are—to pay a reduced sum leaving the annuitant to make up the testator's bounty by claiming repayment of relief from the income tax authorities. In order to fulfil their obligations the trustees are entitled under r. 19 of the General Rules or obliged under r. 21 to deduct tax at the current rate from such a sum as will leave 100*l.* net. The gross sum so arrived at is 153*l.* 16*s.* 11*d.*, so that 53*l.* 16*s.* 11*d.* has to be paid to meet an immediate liability for tax, though that sum may ultimately be found not to be due by the annuitant in whole or in part. In these circumstances

the question arises whether she can claim repayment from the income tax authorities of any sum and, if she can, what that sum should be. Four suggestions have been mooted as to what this sum should be: (1.) It was originally said by the Crown that the claim was one personal to an annuitant in the sense that her claim was confined to any diminution of income which she suffered by reason of the deduction of tax: that in the present case as the annuity was tax-free, no loss of income had occurred, and therefore no claim for repayment was possible. It is true that the appellants tempered the harshness of this contention by offering an *ex gratia* payment of 35*l.*, but they maintained that strictly no repayment was exigible. My Lords, such a result would not, I imagine, commend itself to any tribunal as a fair solution of the difficulty, but in a matter which is purely a question of statutory enactment one must look at the provisions of the various Finance Acts which deal with the matter in order to ascertain if the argument is sound. The right to repayment is now dealt with in ss. 9, 10 and 16 of the Income Tax Act, 1918, read with ss. 40 and 41 of the Finance Act, 1927, which contains certain modifications of the Act of 1918, but does not affect the question at issue. Sections 9, 10 and 16 of the Act of 1918 so far as material read as follows: "9. An individual, who claims and proves, in the manner prescribed by this Act, that his total income " does not exceed the amounts in the six sections next following " shall be entitled to such relief as is mentioned in those sections. " 10. Where the income does not exceed 130*l.* " (at the material date 125*l.*) " the claimant shall be entitled to exemption from " income tax 16. Except as otherwise provided, any " exemption, abatement or relief under the preceding provisions " of this Part of this Act shall be given either by discharge or " reduction of the assessment, or by repayment of the excess " which has been paid. . . . " I see nothing in these provisions or indeed in any of the provisions for relief or repayment of income tax which would prohibit a subject from claiming repayment of tax paid in respect of the income to which he is entitled, though the sum repaid may on receipt be payable to some other person. Indeed the provisions of s. 25, sub-s. 4, of the Finance Act, 1941, seem to show a recognition, at a later date it is true, that a claim for repayment may be made on behalf of a person other than the claimant, and ultimately the Crown was prepared to acknowledge a right on the claimant to receive a sum which, though less than that which

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the annuitant put forward, would enure to the benefit of the trust. It would in my view be unfortunate if a concession even to this extent was not justified, since otherwise the Revenue could retain tax in respect of a sum which normally would be free of tax. (2.) The main argument on behalf of the commissioners however was that the annuitant's gross income was 100*l.* and her net income therefore 65*l.* The necessity which the trustees were under of providing two sums of 50*l.* at stated dates, both long before a return of tax could be claimed, much less recovered, they explained by contending that the trustees must be taken to have advanced the amount of this tax at the date of each payment, and to be entitled to recover it from the annuitant as repayment of a loan when she recovered it from the tax authorities. This, to my mind, is a more attractive argument than that originally advanced, but I do not think it accords with the facts. In the numerous cases in which the question has been raised as to the right of trustees to recover from a *cestui que trust* a sum which he in his turn has recovered from the Revenue authorities such an argument has never been put forward. It is true that in none of those cases was the Crown interested, but it would have been an effective argument on behalf of trustees seeking to recover if it had been sound. The fact is that the 100*l.* is paid under the provisions of the will and without regard to whether the lady has the right to or will recover anything from the Crown. There is no loan in fact of the whole or any part of the tax chargeable on the sum paid nor do I see any necessity for an implication that a loan has been advanced. (3.) and (4.) The actual claim lodged with the inspector of taxes alleged that the annuitant's gross income was 153*l.* 16*s.* 11*d.* and her net income therefore 100*l.*, but she claimed relief only to the extent of 47*l.* 11*s.* 4*d.*, which was the correct figure if her gross income was really 153*l.* 16*s.* 11*d.* I do not however accept this view; the distinction between gross and net seems to me to have no application to a case where income is given free of tax. Her income is 100*l.* but in providing that sum the trustees may take into account tax deducted at the source and must take into account untaxed income which comes into their hands and out of which the annuity is to be paid. In order to meet their obligations and to pay the 100*l.* they therefore required in the existing circumstances a sum of 153*l.* 16*s.* 11*d.* of which 53*l.* 16*s.* 11*d.* had already been deducted in tax. In handing over the 100*l.* they were passing on the exact sum which they

themselves had received but one in respect of which the tax had already been deducted. Even if the trustees had received untaxed income and deducted tax as they must have done under r. 21, theirs would have been the hand which paid the tax but they would have paid it not for themselves but for her, and it appears to me to make no difference whether the tax is deducted at the source or withheld by the trustees. In each case 53*l.* 16*s.* 11*d.* must be paid to the revenue authorities in order that the lady may receive her annuity at the dates demanded by the will. It was her tax, paid to enable her to receive the 100*l.* at the appropriate time. The form of certificate given by the trustees appears to me to represent the true state of affairs: the gross amount on which tax has been suffered by the beneficiary is 153*l.* 16*s.* 11*d.*: the amount of income tax suffered thereon by the beneficiary is 53*l.* 16*s.* 11*d.* and the amount of net payment actually made to or for the benefit of the beneficiary is 100*l.* If then the amount of tax suffered by the beneficiary is 53*l.* 16*s.* 11*d.* and she owes no tax I see no reason why she should not recover the whole sum. The alternative suggestion, that the repayment of 47*l.* 11*s.* 4*d.* only can be recovered depends upon the truth of the suggestion that the annuitant's gross income is 153*l.* 16*s.* 11*d.* That in my view is not so. Her income is 100*l.* and the terms "gross" or "net" are not expressions appropriate to that income. It is true that in order that she may receive 100*l.* at the proper time tax to the amount of 53*l.* 16*s.* 11*d.* has to be set aside. That sum is, as I think, paid on her behalf and is therefore recoverable by her. But it is not hers to keep; it must be handed over to the trustees. In the present case however it is immaterial whether the sum to be recovered is 53*l.* 16*s.* 11*d.* or 47*l.* 11*s.* 4*d.* At least the lesser sum can be claimed and no more is sought. I agree that the appeal should be dismissed.

LORD SIMONDS. My Lords, the terms of this bequest are of a deceptive simplicity: the gift of an annuity free of income tax does not upon the face of it suggest any question of difficulty in regard either to interpretation or to the rights inter se of the Revenue, the annuitant and the residuary legatees. Yet your Lordships have upon one point at least been left in no doubt, namely that such a bequest in fact raises questions of which there is no easy solution. The controversy with which your Lordships are immediately concerned is between the Crown and the annuitant and arises out of an objection made by the

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inspector of taxes to a claim made by the annuitant for repayment of income tax for the year ended April 5, 1940. My Lords, I think that the first stage in the consideration of this question must be to interpret the will of the testatrix. Shorn of the incidental provisions in regard to mode of payment, what is meant by an annuity of 100*l.* free of income tax? It can mean one of two things, either (a) an annuity of such a sum as after deduction of tax at the standard rate for the time being in force will leave 100*l.*, or (b) an annuity of such a sum as after all necessary adjustments in respect of the allowance and reliefs personal to the annuitant have been made will leave her with 100*l.*, no more and no less. Between these two meanings a choice must be made and I do not think that the choice is assisted or should be guided by the fact that the testatrix has given directions in regard to payment which are more easily reconcilable with the one result or the other. The substance of the bequest lies in the words "an annuity or yearly sum at the rate of 100*l.* per annum . . . free of all deductions including income tax. . . ." and giving these words the best consideration that I can, I am clearly of opinion that they import no more than that the annuitant, be her circumstances what they may, is to receive 100*l.*, no more and no less: that is the sum that is to remain in her pocket after tax has been provided for. If she is a payer of sur-tax, then there must be provision for sur-tax: if she is below the level of taxation there will be neither sur-tax nor income tax. This would be very plain if the assessment to tax was made directly upon her. The question would be, what is her income: the answer, 100*l.*: the next question, what tax is payable by her, and the answer, none. No one can fail to be aware of the complications that are introduced by the machinery of tax collection, but they do not in my opinion lead to a conclusion which is so manifestly incorrect as the statement that an annuity of 100*l.* free of income tax is the same thing as an annuity of such an amount as after deduction of tax at the standard rate will leave 100*l.* I say "manifestly incorrect," for in the present case it leads, and necessarily leads, to the further statement by the annuitant that her income is 153*l.* 16*s.* 11*d.* I see no justification for such a statement. It is indisputable as a mathematical proposition that 153*l.* 16*s.* 11*d.* is the sum which after deduction of tax at seven shillings will produce 100*l.*: it is therefore true that every 100*l.* of tax-paid income in the hands of the trustees represents a

gross income of 153*l.* 16*s.* 11*d.* But it does not follow that the annuitant's income is 153*l.* 16*s.* 11*d.* We know that if her income is 100*l.* she pays no tax. Why then should an income of 100*l.* free of tax in her case be stated to be 153*l.* 16*s.* 11*d.* In coming to this conclusion I do not in any way dissent from the proposition of law stated by Lord Sands in *Hunter's Trustees v. Mitchell* (1): "Income tax is a tax upon the income" of the person who enjoys the income. In whatever manner "it may be collected, its ultimate incidence is upon the income" of this person. So rigid is this principle that when under a "will an annuity is payable free of income tax, the amount of" the tax is taken to be an additional gift, and is included in "the income of the annuitant when, for revenue purposes, a" "return of total income is necessary." This has been accepted in England as in Scotland as an accurate statement of the law: see also *North British Railway Co. v. Scott* (2). But it leaves entirely open the question what upon the true interpretation of a particular will is the amount of the tax which is the subject of the additional bequest. It may be either the hypothetical standard rate of tax or the actual tax which the particular beneficiary has to bear and the actual tax may be by virtue of allowance and relief less than the standard rate or by virtue of the addition of sur-tax may be something more than the standard rate.

It is, I think, upon this point that the issue really turns. The Lord President (from whose opinion I very reluctantly differ) says that (3) "for the purpose of grossing the income, "income tax must be taken at the standard rate of tax." If it were so, I should find his conclusions difficult to resist. But holding as I do that the meaning and effect of the will is that the annuitant is to have her annuity free of the tax which she, her total income being what it is, would pay in respect of it, not free of the tax which she would have to pay if her total income was something quite different, I cannot accept the view that for the purpose of grossing the income the tax must be taken at the standard rate. Here I find myself in complete agreement with the judgment of Romer J. in *In re Pettit. Le Fevre v. Pettit* (4), as expounded by Lord Greene M.R. in *In re Maclellan. Few v. Byrne* (5): "He treats the direction "in the will" (i.e., a direction to pay an annuity free of income

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(1) 1930 S. C. 978, 982.

(2) [1923] A. C. 37.

(3) 1944 S. C. 286, 293.

(4) [1922] 2 Ch. 765.

(5) [1939] Ch. 750, 758.

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tax) " as a direction to the trustees to ascertain what is the
 " gross sum which will give the net annuity specified, a clear
 " sum of 1,000*l.* He points out that in calculating that gross
 " sum it would lead to an inaccurate result if the trustees
 " merely calculated it by reference to the deduction which it
 " was permissible for them to make without reference to the
 " recoveries which the annuitant might obtain. He says that
 " the true calculation which the trustees ought to make is to
 " ascertain a sum which, after taking not merely the initial
 " deduction but also the matter of relief into account, will
 " produce the net sum specified. If I may say so with respect,
 " that reasoning appears to me to be as satisfying as any
 " reasoning can be." It may further be observed that, as was
 pointed out by Evershed J. in *In re Tatham*. *National Bank*,
Ld. v. Mackenzie (1), Romer J. was not deterred from coming
 to this conclusion by the fact that the testator had directed
 that the annuity should be paid in equal quarterly payments.

This then, my Lords, upon the true construction of the will is
 the measure of the bounty of the testatrix. Somehow, in
 conformity with the provisions of the law of income tax, she is to
 receive 100*l.*, no more and no less. But it is at this point that
 the difficulty arises. In *In re Hooper*. *Phillips v. Steel* (2),
 Uthwatt J. justly observes " Testators frequently provide that
 " an annuity of an amount specified by them is to be free of
 " income tax or is to be paid without deduction of income tax.
 " These words do not fit in at all comfortably with the provisions
 " of the Income Tax Acts, for it is beyond the competence
 " of testators to free an annuity from income tax. The income
 " tax withheld on payment of an instalment of an annuity is
 " not a deduction from the annuity: and where part of the
 " annuity is not payable out of profits and gains brought into
 " charge the withholding of the income tax appropriate to that
 " part is obligatory on the payer." The learned judge proceeds
 to point out (3) that the intention disclosed by such phrases,
 " or phrases of similar import disclosing an intention to relieve
 " the annuitant of the burden of income tax, is carried out by an
 " appropriate increase in the amount specified for the annuity,
 " the increase being such as to enable the annuitant to receive
 " the specified amount after the tax incident to the increased
 " annuity in the hands of the annuitant has been satisfied in
 " manner required by the Act." The question then is how the

(1) [1945] Ch. 34, 38.

(3) *Ibid.* 173.

(2) [1944] Ch. 171, 182.

intention of the testatrix is to be carried out. How are the trustees to provide the beneficiary (a) with an annuity of 100*l.* and (b) with such further sum as will leave her that sum after her liability to tax has been satisfied? And, further, how are they to do this conformably with r. 19 or r. 21 (as the case may be) of the General Rules applicable to Schedules A, B, C, D and E of the Income Tax Act? My Lords, it appears to me to be quite clear that this result is satisfactorily achieved, so far as the substance of the gift is concerned, by paying to the annuitant 65*l.* in cash and giving to her a certificate which enables her to recover 35*l.* from the Revenue. But it is said that the form of the gift is in this way disregarded, for the testatrix has prescribed payment at two terms in the year and presumably in two equal parts. What then? Is the substance of the gift to be disregarded in order that form may be observed? The testatrix has made a bequest which is in form irreconcilable with the statutory machinery for the collection of tax. I see no reason why, in order to observe form, the fiction should be adopted that her income is 153*l.* 16*s.* 11*d.*, or, in other words, that the bequest to her is of an annuity of that amount.

I am led to the same conclusion by a consideration of the provision for repayment of tax contained in s. 29 of the Income Tax Act, 1918 (as amended by s. 32 and the Third Schedule to the Finance Act, 1920). That section provides: "(1.) If it is "proved to the satisfaction of the General Commissioners that "any person whose claim for allowance or deduction or relief "has been allowed, has paid any tax, by deduction or otherwise, "the General Commissioners may, in the form prescribed "certify the facts proved before them to the Special Com- "missioners. (2.) The certificate of the General Commissioners "shall state the particulars of the different sources of income "in respect of which tax has been paid, the relief to which the "claimant is entitled, the amount repayable in respect thereof, "and the name and place of abode of the claimant. (3.) On "receipt of the certificate, the Special Commissioners shall "issue an order for repayment." This section appears to me to look at nothing but the position of the individual taxpayer. What is his total income? From what sources is it derived? Upon that basis to what allowance or relief is he entitled? These questions and the answers that must be given to them are not consistent with the solution of the present case by which admittedly the repaid tax is not to be retained by the claimant. I must respectfully dissent from the proposition which has

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found favour with the Court of Session, that this is a matter irrelevant to the issue. On the contrary, the question being what is the income of the annuitant for the purpose of determining the allowances and reliefs to which she is entitled, I think it very germane to ask whether the sums that are repaid to her belong to her in her own right. And, if I find that they belong not to her but to another, then I take leave to doubt the major premiss, namely, the amount of her income, upon which her claim to repayment was based. So here the annuitant claims relief and repayment upon the basis of a total income of 153*l.* 16*s.* 11*d.* But, having obtained repayment of 47*l.* odd, she hands that sum over to the trustees and she does so for no other reason than that, since her total income is not 153*l.* 16*s.* 11*d.* she is not entitled to retain it. But if her total income is not 153*l.* 16*s.* 11*d.* (a conclusion to which on the construction of the will I had already come) she is not entitled to relief and repayment upon the footing that it is.

My Lords, I was much impressed by other considerations advanced by the learned Lord Advocate. It is, I think, material to ask what is the character of this 47*l.* of repaid tax when it has reached the hands of the trustees. In the hands of the annuitant it is a sum which has been repaid to her upon the footing that it was a tax paid by her by deduction or otherwise. In the hands of the trustees how is it to be regarded? As part of the trust income, presumably. But I do not know whether it is income upon which tax has been paid or is income which is still liable to tax under some case of some schedule. It is not conclusive that such an apparently insoluble problem arises, but my doubts about the correctness of the decision under appeal are strengthened. Yet another difficulty presses on me. I do not understand why only 47*l.* 11*s.* 4*d.*, not 53*l.* 16*s.* 11*d.*, is repayable upon the basis of the respondent's argument. If her total income was in fact 153*l.* 16*s.* 11*d.*, then she would be entitled to 47*l.* 11*s.* 4*d.* and no more. But I do not understand that it is contended at the Bar that her total income was in fact 153*l.* 16*s.* 11*d.* On the contrary the argument is that, as the Crown has received 53*l.* 16*s.* 11*d.* by way of tax in respect of every 100*l.* of income left in the hands of the trustees, therefore it has received 53*l.* 16*s.* 11*d.* in respect of the 100*l.* paid by the trustees to the annuitant. If so, since *ex hypothesi* the annuitant pays no tax, the whole of the 53*l.* 16*s.* 11*d.* should be repaid. But it is sufficiently obvious that no such claim could validly be made either by the

annuitant or anyone else under s. 29 of the Finance Act, 1918. Again I am forced to doubt the soundness of the foundation of the claim.

The respondent relied in this House (though the point appears not to have been raised in the Court of Session) upon s. 25 of the Finance Act, 1941, which, it is said, shows that the procedure adopted by the trustees in this case is the procedure which Parliament contemplated for every case of payment of a stated sum free of income tax. I am unable to accept this argument. It is as tenable a view that this section is dealing only with the case where the annuitant does in fact bear tax at the standard rate. If the section does cover the case of the respondent's annuity and she is entitled to an annuity only of 68*l.* 19*s.* 3*d.* free of tax I must admit that for my part I do not see what advantage she derives from it. I do not think that this section absolves your Lordships from the duty of construing the will and reconciling its provisions, so far as they can be reconciled, with the machinery of the income tax law. It has been urged in favour of the claim, that the trustees have no means of finding out what the position of the annuitant is in regard to reliefs and allowances, that they cannot compel her to tell them, and therefore that they can do no other than pay her the full nominal amount of the annuity. From this proposition too I must dissent. As I see it, the trustees can only perform their duty properly, i.e., provide an annuity of 100*l.* free of tax, if they know what is the tax that the annuitant has to pay, and they are accordingly entitled to obtain from her all necessary information and to satisfy themselves that it is correct. If the annuitant was a payer of sur-tax, she would have to give the trustees all the information about her income which would enable them to provide her with an annuity free of tax. I see no reason why she should not do so, whatever may be the measure of the freedom that she claims.

Finally I must recur to the contention that, if the solution that I favour is adopted, the mode of payment prescribed by the testatrix is ignored. If this is the necessary result I do not shrink from it. It is to my mind preferable to saying that a bequest of an annuity of 100*l.* free of tax to an annuitant who, if she had 100*l.* of income and no more, would pay no tax, is equivalent to a bequest of an annuity of 153*l.* 16*s.* 11*d.* upon which she ultimately pays tax of 6*l.* 5*s.* 7*d.* and recovering 47*l.* 11*s.* 4*d.* by way of personal relief and allowance hands that sum over to another. But I would not finally express an opinion

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that it is the necessary result. It may well be that it would be proper in the administration of this trust, in order to give effect to the testamentary intentions, for the trustees to make the necessary advances by means of equal half-yearly payments subject to the necessary accounting when the annuitant had recovered the tax paid in respect of 100*l.*, i.e., in the year under review the sum of 35*l.* I do not venture, particularly as this is a case arising under the law of Scotland, to express any view upon this without hearing argument on the part of the annuitant and the residuary legatees. I would allow this appeal and answer the question of law stated for the opinion of the court by saying that the decision of the majority of the Commissioners was not right.

Appeal dismissed.

Solicitor for appellants : *Solicitor of Inland Revenue.*

Solicitors for respondent : *Beveridge & Co., for Cooper & Brodie, W. S., Edinburgh.*

[PRIVY COUNCIL.]

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Oct. 9.

CORPORATION OF THE CITY OF } APPELLANT ;
TORONTO }

AND

ATTORNEY-GENERAL FOR CANADA . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada—Administration of justice—Criminal Law—Prosecution—Instituted and conducted by Dominion Government—Conviction in provincial Supreme Court—Fine—Payable to Dominion Minister of Finance—Criminal Code of Canada, R. S. C., 1927, c. 36, s. 1036.

By sub-s. 1 of s. 1036 of the Criminal Code of Canada :
“ Whenever no other provision is made by any law of Canada for
“ the application of any fine imposed for the violation of
“ any law the same shall be paid over to the
“ treasurer of the province in which the same is imposed or
“ recovered, except, that (a) (b) all fines imposed
“ for whatever cause in any proceeding instituted at the instance
“ of the Government of Canada in which that Government

*Present : VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN,
LORD MACMILLAN, LORD PORTER and LORD SIMONDS.

" bears the cost of prosecution shall belong to His Majesty
 " for the public uses of Canada, and shall be paid to the
 " Minister of Finance; Provided, however, that with
 " respect to the Province of Ontario the fines first mentioned
 " in this section shall be paid over to the municipal or local
 " authority where the municipal or local authority wholly or in
 " part bears the expense of administering the law under which the
 " same was imposed or recovered " :—

Held, that " the fines first mentioned in this section " in the proviso to sub-s. 1 of s. 1036 are all fines other than those excepted in heads (a) and (b), and refer to the fines dealt with in the beginning of the section, that is, in the main enactment. Accordingly, where the Dominion Government instituted, conducted and bore the costs of prosecutions against a number of companies which, in the result, were convicted in the Supreme Court of Ontario at Toronto of contravening the provisions of s. 498 of the Criminal Code, which is directed against conspiracies and combinations restrictive of industry and commerce, the fines imposed were payable to the Minister of Finance of the Dominion and not to the Corporation of the City of Toronto.

Judgment of the Court of Appeal for Ontario [1943] O. R. 238, affirmed.

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APPEAL (No. 50 of 1943) from a judgment of the Court of Appeal for Ontario (March 12, 1943) affirming a judgment of the Supreme Court of Ontario (October 14, 1942).

The following facts are taken from the judgment of the Judicial Committee. The Attorney-General for Canada on behalf of the Minister of Finance of the Dominion and the Corporation of the City of Toronto were competitors for a sum of \$155,000 in the hands of the registrar of the Supreme Court of Ontario. That sum consisted of fines imposed on a number of companies convicted of contraventions of s. 498 of the Criminal Code, which was directed against conspiracies and combinations restrictive of industry and commerce. The prosecutions which resulted in the imposition of those fines were instituted and conducted by the Dominion Government. The trial, which was on indictment, took place at the assizes of the Supreme Court of Ontario at Toronto, before Hope J., sitting without a jury.

On the application of the registrar, with whom the fines had been deposited, Henderson J., on April 7, 1942, made an order directing that an issue be tried, with the Attorney-General for Canada as plaintiff and the Corporation of the City of Toronto as defendant, for the determination of the question whether the Minister of Finance of the Dominion or the Corporation

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was entitled to the deposited fines. Pleadings were ordered and lodged, a minute of admissions of fact was agreed, and the case came on before Hope J., who decided the issue in favour of the plaintiff. The Court of Appeal for Ontario (Robertson C.J.O., Fisher, Gillanders and Kellock JJ.A., Henderson J.A. dissenting), affirmed that decision, and the matter came before their Lordships of the Board for final determination.

The question turned on the interpretation to be placed on s. 1036 of the Criminal Code, of which the first sub-section was as follows :

“ Whenever no other provision is made by any law of Canada
 “ for the application of any fine, penalty or forfeiture imposed
 “ for the violation of any law or of the proceeds of an estreated
 “ recognizance, the same shall be paid over by the magistrate
 “ or officer receiving the same to the treasurer of the province
 “ in which the same is imposed or recovered, except that

“ (a) all fines, penalties and forfeitures imposed in respect
 “ of the breach of any of the revenue laws of Canada, or
 “ imposed upon any officer or employee of the Government
 “ of Canada in respect of any breach of duty or malfeasance
 “ in his office or employment, and the proceeds of all
 “ recognizances estreated in connexion with proceedings for
 “ the prosecution of persons charged with such breaches
 “ or malfeasance ; and

“ (b) all fines, penalties and forfeitures imposed for what-
 “ ever cause in any proceeding instituted at the instance
 “ of the Government of Canada or of any department
 “ thereof in which that Government bears the cost of
 “ prosecution, and the proceeds of all recognizances estreated
 “ in connexion with such proceedings,
 “ shall belong to His Majesty for the public uses of Canada,
 “ and shall be paid by the magistrate or officer receiving the
 “ same to the Minister of Finance and form part of the
 “ Consolidated Revenue Fund in Canada ;

“ Provided, however, that with respect to the Province of
 “ Ontario the fines, penalties and forfeitures and proceeds of
 “ estreated recognizances first mentioned in this section shall
 “ be paid over to the municipal or local authority where the
 “ municipal or local authority wholly or in part bears the
 “ expense of administering the law under which the same
 “ was imposed or recovered.”

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(of the Ontario Bar) for the appellant. The proviso is one on the whole section, and "fines . . . first mentioned" in the proviso refers to fines "for the violation of any law" not otherwise dealt with by the law of Canada, which are to go to the municipal authority in every case in which it in part bears the expense of administering the law, and that applies to all cases where they would go to the province in the first part of the section or to the Dominion of Canada under (a) or (b). The appellant did in part bear the expense of administering the law under which the fines were imposed. Secondly, the fines were imposed in proceedings instituted by the Government of Canada in which that Government did not bear "the costs of the prosecution"; it only paid part of them; it did not pay for the grand jury. So far as *Attorney-General for Nova Scotia v. Attorney-General for Canada* (1) goes, it gives a severe limitation to the words "costs of the prosecution." We desire to adopt the view as expressed in the dissenting judgment of Henderson J.A. in the Court of Appeal.

Geoffrion K.C. (of the Quebec Bar) and *Gahan* for the respondent were not required to argue on the question of the Dominion Government bearing the costs of the prosecution.

Effect is to be given to the words "first mentioned in this section" in the proviso. Those words necessarily imply other mentions, and it is suggested that there are three—the opening paragraph, cl. (a) and cl. (b). The opening paragraph deals with all fines, subject to certain exceptions; it does not include the exceptions; if it does, then there is no meaning in the words "first mentioned." The first mention is the first paragraph minus the exceptions. That is a logical interpretation and is consistent with the purpose of the enactment. The argument for the appellant involves erasing the word "except" from the end of the first paragraph, but it is part of the section.

[He was stopped.]

Pritt K.C. replied.

Oct. 9. The judgment of their Lordships was delivered by LORD MACMILLAN, who stated the facts and the terms of s. 1036 of the Criminal Code and continued: The main enactment is clear and unambiguous. So far as affecting fines—and the other categories may for the present purpose be disregarded—it directs that in the absence of any law of Canada to the contrary

(1) [1937] S. C. R. (Can.) 403.

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all fines imposed for the violation of any law shall be paid over to the treasurer of the province in which the fines are imposed or recovered, with the exception of fines imposed in certain classes of proceedings which, because of the nature of those proceedings, are appropriated to His Majesty for the public uses of the Dominion and are to be paid over to the Dominion Minister of Finance. The proviso qualifies this general enactment in the case of the Province of Ontario and directs that "the fines . . . first mentioned in this section" are to be paid over to the municipal or local authority when that authority bears the whole or part of the expense of administering the law under which the fines were imposed or recovered. It is admitted that the Corporation of Toronto defrays the cost of administering justice in the area within which the city is situated.

The contention of the Corporation is that "the fines first mentioned" in the section are fines imposed for the violation of any law "whether or not the fines fall within any of the descriptions contained in sub-classes (a) or (b) of the said section." This was the view of Henderson J.A., who regarded the classes of fines excepted in heads (a) and (b) as fines second and third mentioned in the section. The fines excepted in heads (a) and (b) were thus in his opinion not excepted from the fines specially disposed of by the proviso in the case of the Province of Ontario.

Their Lordships appreciate the verbal point of this interpretation but they do not agree with it. In their opinion "the fines first mentioned" in the section are all fines other than those excepted in heads (a) and (b). The expression "fines . . . first mentioned in this section" does not necessarily imply that there is to be found in the section a series of fines, first mentioned, second mentioned, third mentioned, and so on. Their Lordships read the expression as referring to the fines dealt with in the beginning of the section, that is, in the main enactment. A slight change in the structure of the section, which may be legitimately made, puts the matter beyond doubt. If it had run as follows:—"any fine, except those enumerated in heads (a) and (b), imposed for the violation of any law, shall be paid over to the treasurer of the province in which the same is imposed," it could hardly have been contended that the proviso in disposing otherwise of the fines first mentioned in the section was intended to apply to all fines without exception imposed for the violation of any law.

Incidentally, it may be pointed out that it is inaccurate to designate the excepted heads (a) and (b) as "sub-classes"; they are an inherent part of the main enacting clause.

But apart from these considerations, the substance of the matter plainly justifies the interpretation which commended itself to the majority of the learned judges of Ontario. The purpose of the enactment is to give to the provincial treasurers the fines imposed in their provinces other than those which are expressly appropriated to the Dominion Minister of Finance. But for the proviso fines imposed in the Province of Ontario, with the stated exceptions, would have been payable to the treasurer of the province—not all fines, be it observed, but all fines other than those expressly excepted. The proviso qualifies the generality of the main enactment by providing that in the special case of the Province of Ontario those fines, but only those fines, which would otherwise have gone to the provincial treasurer shall go to the municipal or local authority which bears the expense of administering justice. It would be foreign to the proper function of a proviso to read this proviso as providing that in Ontario not only those fines which the main enactment gives to provincial treasurers should go to the municipal or local authority but also those fines which the main enactment has expressly said shall not be given to provincial treasurers. The reason for the exception of the fines specified in heads (a) and (b) is as cogent in the case of the fines given in Ontario to the municipal or local authority as it is in the case of the fines which elsewhere are to go to the provincial treasurers, for the fines specified in heads (a) and (b) have all the characteristic of being imposed in matters which are the special concern of the Dominion. No reason was suggested why the Dominion should in Ontario be deprived of these fines. In their Lordships' opinion the proviso has no such effect.

A subsidiary argument was submitted on behalf of the Corporation based on an allegation that the Government of the Dominion had not in fact borne all the cost of the prosecutions in question, with the consequence that the deposited fines did not fall within exception (b) on which the respondent relied. There is no substance in this contention. The Attorney-General for Ontario at the inception of the prosecutions expressly disavowed any intention of taking action in the matter in view, *inter alia*, of the facts that the alleged combine involved other provinces besides that of Ontario and that the expense would be substantial. On July 19, 1939, he

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wrote to the Dominion Acting Minister of Justice that "the prosecutions and the expense thereof will be solely the responsibility of the Dominion." That responsibility was accepted on behalf of the Dominion authorities, who have paid all expenses for which accounts have been rendered by the Corporation and who have at all times been prepared to defray any expenses which the Corporation could show that it had incurred.

Their Lordships thus find themselves in agreement with the decision of the courts of Ontario and will humbly advise His Majesty that the appeal be dismissed. The Corporation will pay to the respondent his costs of the present appeal.

Solicitors for appellant : *Freshfields, Leese & Munns.*

Solicitors for respondent : *Charles Russell & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* F. P. H. FINANCE TRUST, LIMITED . APPELLANTS ;

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AND

Feb. 7, 8, 12, 13, 14, 15, 19 ; INLAND REVENUE COMMISSIONERS (No. 2)

Mar. 22.

RESPONDENTS.

Revenue—Sur-tax—Company—Undistributed income—Apportionment among members—Basis—Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 21, sub-ss. 1, 7 and 8, sch. I., paras. 4 and 8—Finance Act, 1928 (18 & 19 Geo. 5, c. 17), s. 18.

In apportioning the amount of the income of a company among the members under the Finance Act, 1922, s. 21, sub-s. 1 and sch. I., para. 8, the Special Commissioners are not bound to apportion it among the members who would have received it had the whole amount been distributed by way of dividend, but should consider the whole position of the members under the company's constitution, including the rights to undistributed profits.

To entitle a company to rely on s. 18 of the Finance Act, 1928, it is not sufficient to forward to the Special Commissioners a copy of the balance sheet and profit and loss account not yet approved in general meeting and subsequently to inform them that the general meeting has been held and that dividends have been declared.

Decision of the Court of Appeal affirmed.

**Present* : LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD PORTER and LORD SIMONDS.

APPEAL from the Court of Appeal.

The facts are stated by LORD RUSSELL OF KILLOWEN in his opinion (1).

Tucker K.C., Wynn Parry K.C., Donovan and F. H. Talbot for the appellants. The question is whether it is permissible to apportion the income in accordance with the rights of the members in a winding-up or, as the appellants contend, only in accordance with their dividend rights. It depends on s. 21 of the Finance Act, 1922, which was passed in consequence of the decision in *Inland Revenue Commissioners v. Blott* (2). (See also *Inland Revenue Commissioners v. Fisher* (3).) In apportioning the amount of the income among the members "in accordance with the respective interests of the members" (sch. I. para. 8 to the Finance Act, 1922), the commissioners are bound to apportion it among those members who would have received it, and in the proportions in which they would have received it, if the whole amount had been distributed by way of dividend in accordance with the rights of the members as defined in the memorandum and articles of association. The matter must be dealt with on the basis of a hypothetical distribution by the company of the whole of its income, in such a way that the sums distributed attract sur-tax. A notional and not an actual distribution is contemplated. The Act refers to "apportionment of the actual income" (para. 8 of sch. I.), not of "funds" or "assets," and accordingly the "interests of the members" referred to subsequently must be interests in income. From the terms of s. 21 and its preamble it appears that its object was to impose sur-tax on those persons who would have received the company's income if it had been in fact distributed by way of dividend. Any other conclusion is inconsistent with *Alexander Drew & Sons, Ltd. v. Inland Revenue Commissioners* (4) which put an exhaustive construction on para. 8. That decision applies to the present case. The appellant's contention does not involve giving to the word "interest" in para. 8 a meaning conflicting with its use in s. 21, sub-s. 7, where "member" is defined as including "any person having a share or interest in the capital or profits or income of a company." An apportionment in literal compliance with that language would lead to absurd results, e.g., the income would have to be apportioned in its entirety

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(1) *Infra*, pp. 45-48, 55-56.

(2) [1921] 2 A. C. 171.

(3) [1926] A. C. 395.

(4) [1932] 17 Tax. Cas. 140.

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to the life tenant of shares in the company and to the remainderman too. Accordingly some selection must be made from the whole body of "members," and para. 8, provides the solution in requiring the income to be apportioned among the members in accordance with such of their interests as relate to the company's income. It would be unnatural and illogical to apportion the income by reference to rights in the capital exercisable only in the event of a winding-up. The circumstance that s. 14, sub-s. 3, of the Finance Act, 1937, provides for such an apportionment exceptionally and in a limited class of case, supports the view that para. 8 of sch. I. to the Act of 1922 does not do so. If the respondents' construction of the words "in accordance with the respective interests of the members," were the right one the provisions of s. 14, sub-s. 3, would be unnecessary. Further, the restriction of the power contained in the sub-section to the case of investment companies sustains the inference that the commissioners have no such power in the case of other companies. [They also referred to s. 13, sub-ss. 2 and 4, and s. 15, sub-s. 6 (c) of the Finance Act, 1939.] When the meaning of a statute has been judicially determined, as in *Alexander Drew & Sons, Ltd. v. Inland Revenue Commissioners* (1), and Parliament subsequently enacts legislation on the footing that the judicial construction was correct, that amounts to a legislative interpretation of the original enactment: *Attorney-General v. Clarkson* (2). The Finance Acts are continuous, and passed annually, and they must be read together. In their case the argument is stronger than in the case of other statutes since they must all be construed as one with the Income Tax Act, 1918. [They referred to *Inland Revenue Commissioners v. Tring Investments, Ltd.* (3); *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Commissioners* (4) and *Penang and General Investment Trust, Ltd. v. Inland Revenue Commissioners* (5), and to the Finance Act, 1927, ss. 31, sub-s. 4 and 32 and the Finance Act, 1936, s. 20, sub-s. 6.] Further, the power of the commissioners to give any direction or make any apportionment in regard to the appellant company's income for the period April 1, 1935, to December 31, 1936, has absolutely determined by reason of s. 18 of the Finance Act, 1928, since they received the accounts for that period and did not within due time intimate their intention to take further action.

(1) 17 Tax Cas. 140.

(2) [1900] 1 Q. B. 156.

(3) [1939] 2 K. B. 503.

(4) [1942] A. C. 643, 660.

(5) [1943] A. C. 486, 489, 495.

By sending the accounts to the commissioners and subsequently informing them of their adoption, and of the dividend declared, the appellants put the commissioners in possession of all the documents and information necessary in the first instance under s. 18, sub-s. 1, of the Act of 1928. The letter from the commissioners dated September 19, 1939, written in answer to one firm the appellant's accountants, indicated that they had proceeded "to consider the position of the company in relation "to the said s. 21" (s. 18, sub-s. 1 of the Act of 1928), since they stated that they proposed to take no further action under s. 21 of the Act of 1922. Once the period of three months from the request to consider the matter had elapsed they had no power to reverse their decision. Both parties complied with the terms of s. 18 of the Act of 1928 and there is no ground for suggesting that the decision of the commissioners would have been any different if the accountants had expressly referred to the section. Under s. 18 it is not necessary that a company should notify the commissioners that it is proceeding under that section when the documents and information referred to therein are forwarded to them. The rule of construction applied in *Punjab Co-operative Bank, Ltd., Amritsar v. Commissioner of Income Tax, Lahore* (1) applies to this case. (See also *Jarvis v. Hemmings* (2).)

Wynn Parry K.C. following. The crucial question is what are "the respective interests of the members" within para. 8 of sch. I. of the Act of 1922 for the purpose of achieving the sole object of s. 21, which is to increase the sur-tax receipts of the Inland Revenue by notionally apportioning a fund, in whole or in part, among the members in such manner that they would be obliged to include the amounts apportioned to them in their tax returns as part of their total income? It is the actual and not the presumed or potential interests of the members which must be considered. It is not permissible to speculate what their interests might have been at the end of the financial year if certain steps had been taken, nor to look at what might have been done within the structure of the company. Their interests must be taken as they stood on the last day of the financial year, and only such interests can be considered. That is the vital date for all purposes and only in the most indirect way can voting rights come into the matter. "Interests" must mean rights enforceable in a court of law and nothing more vague, i.e., the rights which the member has under the

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(1) [1940] A. C. 1055.

(2) [1912] 1 Ch. 462.

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articles of association as they stand : see *Walton v. Saffery* (1). The articles of association, outside which there is no contract, bind all classes of shareholders and also bind the commissioners, who must recognize that contract and are not entitled to make a new contract between the members save so far as is allowed by s. 14, sub-s. 3, of the Act of 1937, which is applicable only to investment companies. The articles of this company are valid and effective and are not a sham, and effect must be given to all the consequences flowing from them. No one of the three preference shareholders could procure the winding up of the company or an alteration of the articles of association and there was no evidence to justify the assumption that they would act in concert (see art. 47 of the articles of association, the substance of which is not affected by the proviso to it). Further, the "understanding" with the National Mining Corporation Ltd. to which the commissioners alluded in the case stated was not found by them, on the language they used, to be a binding contract.

[Their Lordships did not require to hear argument on behalf of the respondents on the point under s. 18 of the Finance Act, 1928.]

Sir David Maxwell Fyfe S.-G., J. H. Stamp and R. Hills for the respondents. The apportionment was rightly made among the three preference shareholders in pursuance of the direction made under s. 21 of the Finance Act, 1922. In applying para. 8 of sch. I. of the Act the commissioners are not confined to the consideration of the participation of members in dividends. They ought to consider the whole position under the articles of association, including the rights of the members to undistributed profits in a winding-up. They must consider all their different interests in the capital or profits or income of the company both as a going concern and in a winding-up, so as to ascertain who are the persons beneficially interested in the income in question and in what proportions they are interested. In para. 8 "interests" means all rights and powers relevant to establishing a beneficial title to the income of the company : see the definition in the Oxford English Dictionary and also *William Cory & Son, Ltd. v. Harrison* (2). The persons interested each receive the income fund either by being paid a dividend or by causing the company to be wound up. On that basis the commissioners must

(1) [1897] A. C. 299, 315.

(2) [1906] A. C. 274, 276.

(1.) find whether any person has an interest which must be considered in the apportionment and (2.) evaluate his rights and powers in establishing his title to the income fund, even if he has not exercised them. Even an unexercised option is an interest. The fund is available for distribution as dividends or for other purposes dependent on the constitution of the company. If the proper inference from its constitution is that the only persons who can get the fund are those who would take on a winding-up they are the only persons who can be said to have an interest in it. The members whose income the company's income is to be deemed to be need not necessarily be shareholders. As regards the structure of this company, the appellants relied on art. 47 but they ignored the proviso to it, to which effect must be given. The words "which would otherwise have been distributed" in the preamble to s. 21 of the Act of 1922 mean "which would have been distributed if a tax avoidance scheme had not been in operation." The mischief struck at is failure to distribute a reasonable amount of the company's income and also distribution in an incorrect fashion. The preamble has no limiting effect and must be taken as covering both. The successive enactments of the Finance Acts bearing on the present point were developed in consequence of the cases of *Inland Revenue Commissioners v. Sansom* (1); *Inland Revenue Commissioners v. Blott* (2); *Inland Revenue Commissioners v. Burrell* (3); and *Inland Revenue Commissioners v. Fisher* (4). In a succession of statutes like the Finance Acts it does not necessarily follow that because a later statute may cover the same points as an earlier, those points have not been covered by the earlier Act. It does not follow from *Alexander Drew & Sons, Ltd. v. Inland Revenue Commissioners* (5) that it is not permissible to look at all the rights and powers enabling a member to establish a title to the income. By s. 31, sub-s. 4 of the Finance Act, 1927, only the pre-requisites for the application of s. 21 of the Act of 1922 were altered. *Inland Revenue Commissioners v. Fred's Securities Co.* (6) shows how the matter should be approached in a case under s. 14, sub-s. 3, of the Act of 1937. [They referred to *Inland Revenue Commissioners v. Tring Investments, Ltd.* (7); *Thomas Fattorini (Lancashire), Ltd. v. Inland*

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(2) [1921] 2 A. C. 171.

(3) [1923] 2 K. B. 478; [1924]
2 K. B. 52.

(4) [1926] A. C. 395.

(5) 17 Tax Cas. 140.

(6) [1939] 2 K. B. 734.

(7) [1939] 2 K. B. 503, 508.

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Revenue Commissioners (1); and *Penang and General Investment Trust, Ltd. v. Inland Revenue Commissioners* (2).]

J. H. Stamp following. The fundamental question is whether the commissioners are obliged to apply the rule of thumb contended for by the appellants or whether they can look at all the rights and interests of the parties. The appellants contend that the income must be apportioned in accordance with the rights of the shareholders, as if it had been distributed in dividends on the last day of the company's accounting period. If the legislature had intended that, it would have been easy to say so. Such a contention would largely rule out the effect of the definition of "member" in s. 21, sub-s. 7, of the Act of 1922. Moreover it would not give effect either to the technical or the real rights of the parties, but would override both. It was suggested by the appellants that the respondents' contention would require effect to be given to the potential and not to the real rights of the parties, but the same is true of the appellants' contention. The question the commissioners must answer is: For whose benefit is the income accruing? It is irrelevant that those persons would receive it as capital. The preamble to s. 21 of the Act of 1922 is a summary statement of the purposes of the section. It does not refer to dividends but only to "the withholding from distribution of income." The question is: Whose would this income have been if there had been no tax avoidance scheme? In this case the three ladies were the persons for whom the income was being withheld. The whole code established by the Acts would be absurd if it were cut down to the simple rule of thumb contended for by the appellants.

Tucker K.C. in reply. The respondents' argument depends rather on what it was contended the Act of 1922 should have contained than on what it did contain. This is an amending Act and one is entitled to look at the mischief it was designed to correct: see *In re Mayfair Property Co.* (3). In it Parliament was making a limited attack on a limited class of company. As regards the meaning of "interest," a shareholder may have an interest in the profits or the share capital of a company but not in the capital assets. A shareholder in the company owning Shell-Mex House would have no insurable interest in it, even if he held all the shares, though the smallest pecuniary interest will support a policy of insurance: see *Macaura v.*

(1) [1942] A. C. 643, 652.

(3) [1898] 2 Ch. 28, 35.

(2) [1943] A. C. 486, 484, 497, 499.

Northern Assurance Co., Ltd. (1). *Alexander Drew & Sons, Ltd. v. Inland Revenue Commissioners* (2) put an exhaustive construction on para. 8, of sch. I. of the Act of 1922 and governs this case: see also *In re Alexander Drew & Sons, Ltd.* (3). [He also referred to *Penang and General Investment Trust, Ltd. v. Inland Revenue Commissioners* (4) and *Roomwood Investments, Ltd. v. Inland Revenue Commissioners* (5).]

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THE HOUSE took time for consideration.

Mar. 22, 1945. LORD RUSSELL OF KILLOWEN. My Lords, this appeal is concerned with the provisions of s. 21 of the Finance Act, 1922, as amended by subsequent legislation, dealing with the imposition of sur-tax upon the income of certain companies which fail to distribute reasonable dividends. The facts of the case which are relevant to the determination of the legal questions involved in the appeal must first be stated.

The appellant company (which I will refer to simply as the company) was incorporated on September 13, 1912, under the name Rhoex Development Co., Ltd., with a nominal capital of 100*l.* divided into a hundred shares of 1*l.* each. Although its objects as stated in its memorandum of association cover innumerable fields of activity, the company for many years seems to have lived quietly with its modest capital apparently doing nothing in particular. In the year 1927, however, it developed considerable activity. Its capital was increased to 10,000*l.* divided into 10,000 shares of 1*l.* each; it adopted new Articles of Association; it changed its name to F. P. H. Finance Trust, Ltd.; and it became a trading company the business of which consisted mainly in financing and dealing in the shares of gold mining and mining development companies. The whole of its capital was issued, and belonged beneficially to Mrs. Latilla, the wife of one H. G. Latilla. In the year 1934 Mrs. Latilla sold her shares to Marlands Trust, Ltd. (a company incorporated in Southern Rhodesia) in exchange for debentures in the purchasing company, the shares in which were held by Mrs. Latilla and her two daughters, Mrs. Mayo and Mrs. Campbell. The 10,000 shares in the company were transferred to the Rhodesian company and its nominees. No dividends were paid on the shares so transferred, but a very large income was accumulated by the company for the benefit of the Rhodesian

(1) [1925] A. C. 619, 626, 630.

(4) [1943] A. C. 486, 499.

(2) 17 Tax Cas. 140.

(5) [1942] 1 K. B. 420.

(3) [1935] Ch. 93.

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company which was not assessable to sur-tax. The individuals, however, who owned the shares in the Rhodesian company, became apprehensive in the year 1936, that, as a result of recent financial legislation, the income of the company might be regarded as income of the shareholders of the Rhodesian company and thus become assessable to sur-tax. With a view to avoiding the possibility of their thus being called upon to bear a share of the country's taxation, they decided to act. In pursuance of this decision the capital structure of the company was altered, and made to represent a state of affairs in which it would seem that the only persons who were beneficially interested in the profits earned by the company gave up that interest (except to the extent of five per cent. upon a capital of 10,000*l.*) to new-comers who were prepared to invest in the company the modest sum of 1,000*l.* Accordingly on November 27, 1936, special resolutions of the appellant company were passed by which (1.) its capital was increased to 11,000*l.* by the creation of 1,000 shares of 1*l.* each, (2.) the existing 10,000 shares became preference shares, the new shares being ordinary shares, (3.) the preference shares became entitled to a fixed cumulative dividend of five per cent. and, in a winding up to the whole of the surplus assets after payment to the ordinary shareholders of the amounts paid up on their shares and (4.) the ordinary shares became entitled as regards profits (subject to the rights of the holders of the preference shares) to have distributed among the holders "the whole of any sums declared for distribution as dividends out of the profits of the company," and (as regards assets) the right in a winding up to a priority repayment of 1,000*l.*, but with no further or other participation in the assets of the company. It is however to be noted that the voting power was unaltered. It remained as provided in the articles adopted in 1927, viz., a vote for every share, a provision which left complete control of the company in the hands of the preference shareholders. These, at this stage, were the Rhodesian company and its nominees, they in their turn being under the complete control of Mrs. Latilla and her daughters. Attention may, I think, properly be called to the unusual type of ordinary share thus created, a share with no interest in surplus assets on a winding up beyond the repayment of the capital paid up on it, and with no interest in the profits beyond such a dividend as might be allowed to be declared in their favour by those who by their votes control the company. It is not therefore surprising to find

that no offer of these unattractive shares was made to the public. They were, by arrangement, taken up and paid for by the National Mining Corporation, Ltd., a public company with the said H. G. Latilla on its board, one term of the arrangement being that the company would offer the corporation twenty-five per cent. of any underwriting business which it undertook thereafter. The Special Commissioners say, in the case stated, that it is clear that the ordinary shares were offered to the corporation with conditions attached; they further state that it is clear that the corporation did not seek the investment, but was sought out by the company, and they add a passage in the following terms:—"The scheme by which the capital structure of the appellant company was reorganized within a month of the end of the accounting period under review, was admittedly designed to continue for the benefit of Mrs. Latilla and her daughters the immunity from liability to sur-tax which they had succeeded in securing under the original evasive design. In our view it is inconceivable that such immunity was to be bought at the price of handing over to the National Mining Corporation Ltd. any substantial part of the profits the conservation of which was of the very essence of the scheme, and we have come to the conclusion, after considering such evidence as we had before us to a contrary effect, that there was an understanding that any dividend declared on the ordinary shares should be so limited as to be ludicrously incommensurate with the amount of the income available for distribution." On December 15, 1936, the Rhodesian company went into liquidation, and in the same month its 10,000 preference shares in the company were distributed among Mrs. Latilla (3,334 shares) and Mrs. Mayo and Mrs. Campbell (3,333 shares each). The ladies were entered in the company's share register as the respective holders of those shares on February 2, 1937. On October 12, 1937, the company adopted the accounts for the period of twenty-one months from April 1, 1935, to December 31, 1936, which showed a profit for the period of 645,192*l.*, and authorized the distribution of a sum of 146*l.* 11*s.* 6*d.* by way of dividends, viz., 46*l.* 11*s.* 6*d.* in payment of a dividend on the preference shares at the rate of five per cent. per annum from November 27, 1936, to December 31, 1936, and 100*l.* in payment of a dividend of ten per cent. on the ordinary shares for the period to December 31, 1936. On April 1, 1938, the company went into liquidation. In the winding up the corporation

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received payment of the 1,000*l.* paid up on the ordinary shares, and the balance of the assets was distributed among Mrs. Latilla and her daughters. On September 2, 1940, the Commissioners issued a direction under s. 21 of the Finance Act of 1922, that for the purposes of assessment to sur-tax the income of the company for the period from April 1, 1935, to December 31, 1936, should be deemed to be the income of the members; and on May 16, 1941, they apportioned the actual income (computed at 858,817*l.*) as follows: The corporation 100*l.*, Mrs. Latilla 286,296*l.* 5*s.* 0*d.*, Mrs. Mayo and Mrs. Campbell 286,210*l.* 7*s.* 6*d.* each. An earlier apportionment, which apportioned practically the whole income to the said H. G. Latilla was not relied on and may be ignored. On a appeal by the company against this direction and apportionment, the Special Commissioners discharged the apportionment but dismissed the appeal against the direction. At the request of the respondents in your Lordships' House, the Special Commissioners stated a case for the opinion of the High Court. The case was heard by Wrottesley J. who allowed the appeal reversed the decision of the Special Commissioners, dismissed a cross-appeal by the company, and ordered the case to be remitted to the Commissioners for their further consideration and also to make the proper apportionments. An appeal to the Court of Appeal by the company was dismissed.

These being the relevant facts, I now proceed to consider the provisions of the Finance Acts which are applicable to the case, and the contentions of the parties. Section 21 of the Finance Act, 1922, as originally enacted only applied to companies which answered the description contained in sub-s. 6, one ingredient of which was registration since April 5, 1914. It had no application to the company until a later date. The section starts with a preamble which states the object of the legislation in the following terms: "With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows:" Sub-section 1 then states the event on the happening of which the powers conferred by the sub-section come into operation. The event is thus described—"Where it appears to the Special Commissioners that any company to which this section applies has not, within reasonable time after the end of any year or other period ending on any date subsequent to April 5, 1922, for which

“ accounts have been made up, distributed to its members in
 “ such manner as to render the amount distributed liable to be
 “ included in the statements to be made by the members of the
 “ company of their total income for the purposes of super-tax,
 “ a reasonable part of its actual income from all sources for the
 “ said year or other period.” The sub-section then confers
 powers on the commissioners in the following terms: “ The
 “ commissioners may by notice in writing to the company
 “ direct that for purposes of assessment to super-tax the said
 “ income of the company shall, for the year or other period
 “ specified in the notice be deemed to be the income of the
 “ members, and the amount thereof shall be apportioned
 “ among the members.” Sub-sections 2 to 6 contain provisions
 relating to the recovery of the super-tax in question and to
 other matters irrelevant to the questions involved in this appeal.
 Sub-section 7 defines the expression “ member ” by enacting
 that it “ shall include any person having a share or interest in
 “ the capital or profits or income of a company.” Sub-section 8
 enacts that “ the provisions contained in the First Schedule to
 “ this Act shall have effect as to the computation of the actual
 “ income from all sources of the company, the apportionment
 “ thereof amongst members of the company and otherwise for
 “ the purpose of carrying into effect, and in connexion with,
 “ this section.” The provisions of the first schedule which
 relate to apportionment of the said income among members of
 the company are contained in pars. 8 and 9 thereof which run
 thus: “ 8. The apportionment of the actual income from all
 “ sources of the company shall be made by the special com-
 “ missioners in accordance with the respective interests of the
 “ members, and the income as apportioned to each member shall
 “ for the purposes of super-tax be deemed to represent his
 “ income from his interest in the company for the year or other
 “ period and shall be included in the statement of his total
 “ income or in an amended statement of total income which the
 “ special commissioners are hereby authorized to require and
 “ shall be deemed to be the highest part of that income.
 “ 9. The income apportioned to a member of a company under
 “ s. 21 of this Act shall, for the purposes of super-tax, be deemed
 “ to have been received by him on the date to which the
 “ accounts of the company for the year or period were made
 “ up.” By the Finance Act, 1927 (s. 31, sub-s. 3), an amend-
 ment was made in sub-s. 6 of s. 21 of the Act of 1922, the effect
 of which was to bring the company under, and make it subject

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to, the provisions of that section. By the same Act (s. 32) provision was made for the case where a member of a company which was subjected to the operation of s. 21 of the Act of 1922 was itself a company. In such a case it was provided that the excess (as therein described) of the amount apportioned to the last-mentioned company should for the purposes of the said section be deemed to be income of members of that company "and shall be apportioned among them in accordance with "their respective interests in that company."

The main point at issue between the parties can now be stated. The appellants contend that the commissioners in apportioning the amount of the income in question among the members "in accordance with the respective interests of the "members" are bound to apportion it among those members who would have received it, and in the proportions in which they would have received it, if the whole amount had been distributed by the company by way of dividend in accordance with the rights of the members as defined in the memorandum and articles of association of the company. The result in the present case of an apportionment on those lines would be that a very small part of the fund would be apportioned in substantially equal shares among Mrs. Latilla and her daughters, and that the balance (being substantially the whole of the 858,817*l.*) would be apportioned to the corporation. On the other hand, the respondents attribute a wider meaning to the words "the interests of the members." They contend that the commissioners must take into consideration all the different interests of the members, including voting power and all shares or interests in the capital or profits or income of the company as a going concern or in winding-up, for the purpose of ascertaining who are the persons who in fact are beneficially interested in the income in question, and in what proportions: in short that the commissioners should consider the whole position of members under the company's constitution, including their rights to undistributed profits and otherwise in a winding-up.

My Lords, in my opinion the contention of the appellants places far too narrow a construction upon the wide and comprehensive words which the legislature has used, and I can find no language in s. 21 to justify such a construction, but much to justify a broader interpretation. The foundation of the power given by the section to the commissioners is the fact that the company, for an unreasonable time after the end of the

period for which accounts have been made up, has refrained wholly, or in unreasonable measure, from declaring dividends in general meeting, and thus distributing its profits among the persons entitled, according to their rights in dividends so declared. Nothing would have been easier than to provide that the income should be apportioned among the same persons, and in the same manner, as if the income in question had been so distributed by way of dividend. The section, however, does not do this. It first enacts that the income in question is to be treated as if, instead of being the company's income, it were the income of the members. No notional declaration of dividend is envisaged at all. The income (which is now envisaged not as the company's income at all, but as income of the members) then has to be apportioned in accordance with the respective interests of the members. What justification can there be for restricting the interests which the commissioners may take into consideration, to rights in declared dividends, when no declaration of dividend, notional or otherwise, is contemplated by the section? I can find none. I can conceive many cases in which they might well so act, but I cannot assent to the view that they are compelled so to act in all cases. Obviously everyone who falls within the extended definition of member is not necessarily to be included in the apportionment. In my opinion the commissioners, in apportioning the income among the members, should determine who are the persons of whom it can be said (1.) that they fall within the definition, and (2.) that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions. Further, I think that in considering these interests and apportioning the income among members the commissioners may properly be guided by the preamble to s. 21, and endeavour to make an apportionment appropriate to their interests to those members for whose benefit in relation to the avoidance of payment of super-tax (now sur-tax) the distribution of income has obviously been withheld. They may well ask themselves the questions: (1.) on whom did it depend whether or not the income should be withheld from distribution, and (2.) for whose benefit was the distribution withheld or (in other words) who would avoid payment of sur-tax by the withholding? If the same individuals figure in each answer, those are obviously the persons who, according to their interests in the company, own the real and paramount beneficial interest in the fund in question.

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Other members may also have an interest therein, but to a smaller extent. Applying this view to the facts of the present case, there should be no doubt about the broad result. Both questions admit of one answer only—viz., Mrs. Latilla and her daughters, whose voting power enabled them (1.) to prevent (before liquidation) any distribution to the ordinary shares beyond a nominal percentage, and thus to enforce the “under-“ standing ” referred to in the case stated (2.) to wind up the company at any moment and (subject to the payment of 1,000*l.* to the corporation) get all the surplus assets (including the fund in question) for themselves, or (3.) if ever they wanted the income paid to them as such, to alter the articles of association by special resolution and (notwithstanding art. 47 (1)) thereby increase the dividends payable on the preference shares to any desired amount.

It was contended that the decision in *Alexander Drew & Sons, Ltd. v. Inland Revenue Commissioners* (2) was inconsistent with the contention of the respondents ; but I am unable to agree. In that case the company concerned was a normal trading company which had issued preference and ordinary shares, the interest which each class had in the profits of the company being reflected in the interest which each class possessed in the surplus assets in the event of a winding-up (see the judgment of Eve J. in *In re Alexander Drew & Sons, Ltd.* (3)). There was no such topsy-turvy structure as existed here. The case was concerned only with the apportionment in relation to blocks of both preference and ordinary shares which had been settled on tenants for life and remaindermen by two settlements. The shares were registered in the names of the trustees of each settlement, but the apportionments had been made to the tenants for life. The company had gone into liquidation. Finlay J. affirmed the apportionment and I think rightly on the facts of that case. It was a difficult position. On the one hand, the tenants for life would normally only be entitled to receive the income produced by the share in the

(1) By art. 47: “ If at any
“ time the capital is divided into
“ different classes of shares, all or
“ any of the rights and privileges
“ attached to a class . . . may
“ be modified, commuted, affected,
“ abrogated or abandoned by an
“ extraordinary resolution passed
“ at a separate meeting of the

“ holders of shares of that class
“ Provided that this
“ article shall not be read as
“ implying the necessity for such
“ consent in any case where but
“ for this article no consent would
“ have been required.”

(2) 17 Tax Cas. 140.

(3) [1935] Ch. 93, 100.

surplus assets in the winding-up attributable to the settled shares; on the other hand, the remaindermen were only entitled to an interest which might only become an interest in possession at some future unpredictable date. The learned judge solved the problem in the light of s. 31, sub-s. 4, of the Finance Act, 1927, which provided that the income which was in question in the particular case should for the purposes of s. 21 of the Act of 1922 be deemed to be income available for distribution to the members of the company, and he confirmed the apportionment of the whole to the tenants for life, who were the only persons who could be described as beneficially "interested" in any income of the company available for distribution to its members. I am unable to take the view that the decision is inconsistent with the contentions of the respondents in the present case, or that the learned judge was concerned with the questions which, upon the facts of the present case, arise now for your Lordships' consideration. An apportionment which would result in attributing to Mrs. Latilla and her daughters a minute portion of the fund in question and the balance to the Corporation would be a travesty of the truth; it would be an apportionment in the inverse ratio to the actual beneficial interest in the fund in question. It would involve the commissioners closing their eyes to the obvious fact that the persons who owned or controlled all but a nominal interest in the assets and profits of the appellant company were the Latilla ladies; and it would treat as the person overwhelmingly interested in the company's actual income from all sources for the period in question the corporation, whose only interest in fact therein was what the Latilla ladies allowed it to have, an amount which, according to an understanding for which the Latilla ladies had stipulated and which they had the power to enforce, was to be "ludicrously" "incommensurate with the income available for distribution." It would be acting on the ridiculous footing that these ladies, in order to enjoy their income free of sur-tax, had made a present of it to the corporation.

Two further arguments on behalf of the company must be mentioned. Reliance was placed on the provisions contained in the Finance Act, 1937, s. 14, sub-s. 3, a sub-section which runs thus:—"Where a direction is given under sub-s. 1 of s. 21 "of the Finance Act, 1922, with respect to an investment "company, the special commissioners in determining the "respective interests of the members for the purpose of

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“apportioning income in accordance therewith under para. 8 of the first schedule to that Act, may, if it seems proper to them so to do, attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding-up.” The company is not an investment company; but it was said (1.) that if the wider construction of the words “in accordance with the respective interests of the members” was the right one, this enactment was unnecessary, and (2.) that the restriction of the power to the case of investment companies carried with it an inference that the commissioners had no such power in the case of other companies. At first sight this would appear to be a formidable argument. But, if as I think it is, the wider construction is the proper one, the subsection, on closer consideration, would seem not to be inconsistent with that construction. What the section does is merely to enable the commissioners, in the case of investment companies, to disregard all other interests, and look only to interests in the assets on a winding-up. An investment company was a very popular ingredient in tax-evasion schemes, and the structure of investment companies fulfilling that role was very frequently of a most complicated nature, and the income interests of members were elusive and peculiar. In my opinion all that s. 14, sub-s. 3, of the Act of 1937 does is to enable the commissioners to omit all consideration of the state of affairs existing while the company is a going concern, and to apply only the acid test of the interests in surplus assets on a winding-up, which would include all interests in undistributed income. There is nothing in the enactment inconsistent with the contention of the respondents.

The other argument was in the nature of a preliminary objection. It was that, in the circumstances of this particular case, the power of the commissioners to give any direction or make any apportionment in regard to the company's income for the period from April 1, 1935, to December 31, 1936, had absolutely ceased and determined by reason of the provisions contained in s. 18 of the Finance Act, 1928. The relevant provisions of that section run thus:—“(1.) Any company to which s. 21 of the Finance Act, 1922, applies, may at any time after the general meeting at which the accounts of the company made up for any year or other period are adopted, forward to the Special Commissioners for their consideration a copy of the said accounts, together with a copy of the report,

“ if any, of the directors for that year or period, and such
 “ further information, if any, as it may think fit, and the
 “ Special Commissioners shall, subject to the provisions of this
 “ section, on receiving the said accounts and other documents,
 “ if any, proceed to consider the position of the company in
 “ relation to the said s. 21. (2.) The Special Commissioners
 “ may as soon as reasonably may be, but not later than twenty-
 “ eight days after the receipt of the said accounts and other
 “ documents, if any, call upon the company to furnish to them
 “ within twenty-eight days, or such extended period as they
 “ may subsequently allow, such further particulars as they may
 “ reasonably require: Provided that if the particulars so
 “ required are not furnished to the commissioners within the
 “ period or extended period allowed for the purpose they may
 “ proceed under this section upon the information before them.
 “ (3.) Where a company has under sub-s. 1 of this section
 “ forwarded to the Special Commissioners the accounts of the
 “ company for any year or other period, whether with or with-
 “ out any other documents, the following provisions shall have
 “ effect:—(a) unless within three months after the receipt of
 “ the said accounts and other documents, or, if further
 “ particulars have been required as aforesaid, within three
 “ months after the receipt of those particulars, or the expiration
 “ of the period within which those particulars are to be
 “ furnished, as the case may be, the Special Commissioners
 “ intimate to the company their intention to take further action
 “ in the case of the company under the said s. 21 in respect of
 “ that year or other period, the power of the commissioners
 “ to take any such further action in respect of that year or other
 “ period shall absolutely cease and determine.” A few
 additional facts require to be stated in this connexion. The
 company did not in fact ever forward to the commissioners a
 copy of the accounts for the relevant period, adopted at the
 general meeting, which was held on October 12, 1937. It is
 true that in a letter of October 5, 1937, the company’s account-
 ants sent to the commissioners a copy of the balance sheet of
 the company at December 31, 1936, and a copy of the profit
 and loss account for the period ending on that date, but stated
 that the accounts, though settled by the directors, had not yet
 been approved in general meeting. Later, in answer to a
 letter from the commissioners, the accountants (by letter dated
 February 8, 1938) informed them that the general meeting had
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referred to by me, had then been declared. On September 19, 1939, the commissioners wrote a letter to the accountants in which they stated that they did not propose to take any further action under s. 21 of the Act of 1922, in respect of the income of the company for the period ending December 31, 1936. Subsequently, however, they changed their minds, and gave the direction and made the apportionment of which the company now complains. It is not suggested, on this part of the case, that the commissioners could not alter their intention if their powers under s. 21 were still available to them. The point urged is, that as regards the period in question, the powers had ceased because the commissioners had in fact received the accounts for the period in question and had not within the three months intimated their intention to take further action. My Lords, in my opinion there is nothing in this point. The provisions of s. 18 of the Act of 1928 confer on companies a means by which, if they comply with the conditions specified, they can secure for themselves the benefit of a short limitation period, upon the expiration of which they will, as regards an accounting period, be freed from the powers conferred on the commissioners by s. 21 of the Act of 1922. But the provision under which alone this freedom is obtainable (viz., sub-s. 3), operates only where a company has under the first sub-section forwarded to the commissioners the accounts of the company for the period, not the accounts as settled by the directors, but the accounts which have been adopted by the company in general meeting. The specified conditions not having been complied with by the company, the period of three months never began to run. For the reasons which I have indicated I would dismiss this appeal with costs.

LORD MACMILLAN. My Lords, I am so entirely in agreement with the reasons for the dismissal of this appeal which the noble and learned Lord on the woolsack has expounded that I need do no more than express my concurrence.

LORD PORTER. My Lords, I also agree with the opinions expressed by the noble and learned Lord on the woolsack, and concur in the result.

LORD SIMONDS. My Lords, I also concur.

Appeal dismissed.

Solicitors for appellants: *Birkbeck, Julius, Edwards & Co.*
 Solicitor for respondents: *Solicitor of Inland Revenue.*

[PRIVY COUNCIL.]

MOHAMED SUGAL ESA MAMASAN RER } APPELLANT;
 ALALAH }

J. C.*

1945

July 31:
 Oct. 9.

AND

THE KING RESPONDENT.

ON APPEAL FROM THE PROTECTORATE COURT OF THE
 SOMALILAND PROTECTORATE.

Somaliland—Criminal law—Murder—Evidence—Unsworn—Admissibility—Corroboration—Indian Oaths Act (X. of 1873), s. 13.

By s. 13 of the Indian Oaths Act, 1873 (applied to Somaliland by Order in Council): "No omission to take any oath or make any affirmation . . . shall . . . render inadmissible any evidence whatever, in or in respect of which such omission . . . took place . . .":—

Held, that s. 13 of the Oaths Act is unqualified in its terms and applies not only in cases where the omission to administer the oath occurs per incuriam, but also where the court deliberately refrains from administering the oath. Accordingly, the unsworn evidence of a child of about ten years of age, whom the trial judge found competent to testify, but whom he did not consider able to understand the nature of an oath, was rightly admitted.

Queen-Empress v. Sewa Bhogta (1874) 14 Beng. L. R. 294, approved. *Queen-Empress v. Maru* (1888) 1 L. R. 10 A. 207, disapproved.

While it is a sound rule in practice not to act on the uncorroborated evidence of a child, sworn or unsworn, it is a rule of prudence, not of law, and, in the absence of a statutory requirement as to corroboration, once there is admissible evidence a court can act upon it. Corroboration, unless required by statute, goes only to the weight and value of the evidence.

Judgment of the Protectorate Court, appellate side, affirmed.

APPEAL (No. 49 of 1945), in forma pauperis by special leave, from a judgment of the Military Governor of Somaliland sitting as a judge of the Protectorate Court on the appellate side (July 22, 1944), which dismissed the appellant's appeal and confirmed the sentence of death passed on him by the Legal Secretary sitting as a judge of the Protectorate Court (March 30, 1944) for the offence of murder under s. 302 of the Indian Penal Code.

The following facts are taken from the judgment of the

* *Present*: LORD PORTER, LORD SIMONDS and LORD GODDARD.

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Judicial Committee. The appellant, together with his brother Elmi, was charged on March 27, 1944, before the Protectorate Court of Somaliland with the murder of his half-brother, Abdillahi, on or about May 17, 1942. The judge of the court (Major George Paterson) convicted the appellant and sentenced him to death, and acquitted Elmi. The conviction and sentence were confirmed on appeal by the Military Governor (Brigadier G. T. Fisher), sitting as judge of the Protectorate Court on the appellate side, and the appellant subsequently obtained special leave to appeal to His Majesty in Council. The ground on which special leave was given was that the court had admitted and acted upon the unsworn evidence of a girl of about ten years of age, whom the judge found to be competent to testify but whom he did not consider capable of understanding the nature of an oath. It was conceded by the Crown that if her evidence was inadmissible, not being given on oath, there was not sufficient evidence to warrant a conviction. In substance, the only question for decision was whether the law in force in the Protectorate permitted the court to receive evidence from a person who did not understand the nature of an oath but was otherwise competent to testify, as understanding the questions put and being able to give rational answers. It is only necessary to give a very brief statement of the facts as the whole question was one of law.

There had been a dispute between the appellant and the deceased about a she-camel, which had been decided on May 16, 1942, in favour of the latter by a native tribunal, and the appellant had been heard to utter threats against him. On the next day the deceased was murdered, and his body was found near the camp in which both he and the appellant were living. There was evidence that the appellant was seen at the camp just after the body was found, and that immediately afterwards he and his brother disappeared and made no attempt to trace the murderer of their half-brother and so become entitled to blood-money. They did not return to the camp for about six months, and were arrested in consequence of some other dispute about property and charged with the murder rather more than a year after it had been committed. The witness whose evidence was in question in this appeal was a girl named Sudio Mohamed, who at the time of the murder was not more than ten years old, and she was tendered by the Crown as an eye-witness of the crime and as having given the alarm at the camp which led to the finding of the body. It was stated by

the trial judge that she appeared to be intelligent for her age, and that she gave her answers frankly and without hesitation.

By para. 16 of the Somaliland Order in Council, 1929, the Indian Evidence Act, 1872, and the Indian Oaths Act, 1873, were expressly applied to Somaliland. Section 118 of the Evidence Act was in these terms :—

“ 118. All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

“ *Explanation.*—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.”

The material sections of the Oaths Act were ss. 5, 6 and 13, which provided as follows :—

“ 5. Oaths or affirmations shall be made by the following persons :—

“ All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence.”

“ 6. Where the witness, interpreter or juror is a Hindu or Muhammadan, or has an objection to making an oath, he shall, instead of making an oath, make an affirmation.

“ In every other case the witness, interpreter or juror shall make an oath.”

“ 13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.”

1945. July 30, 31. *Pullan* for the appellant. The first question is as to the law applicable in Somaliland. By virtue of s. 16 of the Somaliland Order in Council, 1929, the Indian Evidence Act and the Oaths Act apply, but it is submitted that the Indian Oaths (Amendment) Act, XXXIX. of 1939, which admittedly would render this child's evidence admissible if it applied to Somaliland, is not an Act such as is contemplated

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by s. 16 of the Order in Council and does not apply in Somaliland. It is submitted, firstly, that the unsworn evidence of the child is, under the law which applies to Somaliland, inadmissible evidence—and it is admitted by the Crown that if that evidence is inadmissible there is no sufficient evidence to justify a conviction; secondly, that it cannot be acted on unless corroborated; thirdly, that it is in fact uncorroborated; and fourthly, that a conviction based on a child's unsworn evidence is contrary to all Indian precedents, even in the case of those courts which consider it admissible. In the Indian cases a child's evidence has never been accepted without corroboration, and never with corroboration, properly speaking, because they have always held that apart from the child's evidence there was enough evidence to convict. According to *Queen-Empress v. Sewa Bhogta* (1) the "omission to take any oath" in s. 13 of the Oaths Act includes any omission, and is not limited to accidental or negligent omission. *Queen-Empress v. Maru* (2), however, took the view that s. 13 did not apply to such a case as the present, where the court intentionally omitted to administer the oath. The strongest case for including all omissions, and agreeing with *Queen-Empress v. Sewa Bhogta* (1), is *Ram Samujh v. King-Emperor* (3). [Reference was also made to *Manni v. King-Emperor* (4), *Nafar Sheikh v. Emperor* (5), *Ah Phut v. The King* (6) and *Queen-Empress v. Shava* (7). No conviction for murder can be based on the unsworn statement of a child of about ten years of age, made almost two years after the event.

Gahan, for the respondent, was not called upon.

July 31. LORD PORTER announced that their Lordships would humbly advise His Majesty that the appeal should be dismissed.

Oct. 9. Their Lordships' reasons for dismissing the appeal were delivered by LORD GODDARD, who stated the facts and statutory provisions set out above, and continued: In India the question has more than once arisen whether the omission to take an oath referred to in s. 13 of the Oaths Act applies to a case where the court deliberately refrains from

(1) (1874) 14 Beng. L. R. 294.

(2) (1888) I. L. R. 10 A. 207.

(3) (1907) 10 Oudh Cas. 337.

(4) (1930) I. L. R. 6 Luck. 210.

(5) (1913) I. L. R. 41 C. 406.

(6) I. L. R. [1940] R. 104.

(7) (1891) I. L. R. 16 B. 359.

administering the oath to a witness, or only to cases where the omission is due to some accident or negligence, and opinion on the subject has not been unanimous. It is unnecessary to set out all the cases, but their Lordships will refer to three of them. Soon after the passing of the Act the question came before the High Court of Bengal in *Queen-Empress v. Sewa Bhogta* (1) where a majority of the Full Bench, Jackson J. dissenting, held that the section being unqualified in terms did apply to a case where the court accepted the evidence of a child to whom the oath was not administered on the ground that the witness did not understand its nature. On the other hand, in Allahabad, Mahmood J., in an elaborate judgment, refused to follow that case, and preferred the view of Jackson J. that in such circumstances the evidence was inadmissible—*Queen-Empress v. Maru* (2). The other case to which their Lordships would refer is *Ram Samujh v. King-Emperor* (3), in which an instructive judgment was given by Greeven A.J.C., agreeing with that of the Bengal High Court.

In their Lordships' opinion the decision of the Bengal High Court and that in the case in 10 Oudh cases are right. Section 13 of the Oaths Act is quite unqualified in its terms, and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs per incuriam. If that had been the intention of the legislature it would have been simple to insert words in the section to that effect. No doubt, however, it was recognized that in some backward communities there may well be persons capable of understanding the necessity and duty of speaking the truth without appreciating the religious or moral obligations imposed by taking an oath. It is not to be supposed that any judge would accept as a witness a person who he considered was incapable of understanding not only the nature of an oath but also the necessity of speaking the truth when examined as a witness. It may be observed that this question can no longer arise in India because in 1939 the Indian legislature passed the Indian Oaths (Amendment) Act (XXXIX. of 1939), which settles the law in accordance with the Bengal and Oudh decisions referred to above. A question was raised in this appeal whether that Act applies to Somaliland, but in view of the opinion which their Lordships have formed as to the true construction of s. 13 of the unamended Act they do not find it necessary to decide it, and accordingly

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(1) (1874) 14 Beng. L. R. 294.

(3) (1907) 10 Oudh Cas. 337.

(2) (1888) I. L. R. 10 A. 207.

J. C. they express no opinion whether or not the amending Act is part of the law of Somaliland.

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It was also submitted on behalf of the appellant that assuming the unsworn evidence was admissible the court could not act on it unless it was corroborated. In England, where provision has been made for the reception of unsworn evidence from a child, it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision, and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law. In a careful and satisfactory judgment the judge of the Protectorate Court shows that he was fully alive to this rule and that he applied it, and their Lordships are in agreement with him as to the matters he took into account as corroborative of the girl's evidence. There is no fault to be found with the judgments of either court and their Lordships have humbly so advised His Majesty.

Solicitors for appellant : *A. L. Bryden & Co.*

Solicitors for respondent : *Burchells.*

J. C.*

[PRIVY COUNCIL.]

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Oct. 29.

BRITISH SOUTH AFRICA COMPANY . APPELLANT ;

AND

COMMISSIONER OF INCOME TAX . RESPONDENT.

ON APPEAL FROM THE RHODESIAN COURT OF APPEAL.

Rhodesia—Revenue—Income tax—Company—Business of acquisition and realization of mining rights—Profits—Deduction of cost of acquisition—Income Tax Ordinance (Northern Rhodesia), 1926, (as amended to 1941), s. 5 (a) ; s. 40, sub-s. 2 (b).

* *Present* : VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD PORTER and LORD SIMONDS.

Where an important part of the business of the appellant company, which was incorporated by Royal Charter and had acquired numerous concessions in respect of minerals and mining rights, was, *inter alia*, to "turn to account" its mining rights, and the various transactions by which that was effected were in substance indistinguishable from outright sales of the mining rights, no profit or gain could be said to have arisen for the purposes of assessment to income tax under s. 5 of the Northern Rhodesian Income Tax Ordinance, 1926, as amended, unless and until a balance had been struck between the cost of the acquisition of the mining rights and the proceeds of sale. The principle that where the income of a taxpayer is derived from the exhaustion of a capital asset no deduction can be allowed for the cost of that asset is excluded in cases where the article sold is that which it was the business of the assessee to acquire and to sell. Further, it was immaterial that in dealing with its mineral rights the appellant company had retained an interest either by way of a possible reverter of the property or by a shareholding in a company to which it had made a special grant under the Mining Proclamation of 1912—it was still realizing in the way that appeared most advantageous the assets which it was its business to acquire and realize.

Principle in *Alianza Company v. Bell* [1905] 1 K. B. 184; [1906] A. C. 18, excluded.

Thew v. South West Africa Company (1924) 9 Tax Cas. 141, referred to.

Further, it being admitted that the precise cost of the mineral rights disposed of could not be readily ascertained, the income of the appellant company therefrom in the years of assessment was to be ascertained by applying the relevant provisions of the Income Tax Ordinance, and accordingly, the company having discharged the onus of proving that the assessments which had been made upon it were excessive in that no deduction for the cost of acquisition had been allowed, the matter was referred back to the Commissioner for re-assessment on the proper basis "to the best of his judgment" under s. 40, sub-s. 2 (b), of the Ordinance.

Judgment of the Rhodesian Court of Appeal set aside.

APPEAL (No. 65 of 1943) from a judgment of the Rhodesian Court of Appeal (June 30, 1943) which had dismissed consolidated appeals from a judgment of the High Court of Northern Rhodesia (Appellate Division) (September 23, 1942) whereby objections made by the appellant company, the British South Africa Company, to certain assessments of the Commissioner of Income Tax made on the company were disallowed and the assessments affirmed.

The matter arose on three assessments to income tax made on the appellant company for the years ended March 31, 1938, 1939 and 1940, based on the company's accounts for the years

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ending September 30, 1936, 1937 and 1938, the amount of the assessments being respectively 17,500*l.*, 7,500*l.* and 5,000*l.* The question which arose in this appeal, shortly stated, was whether certain receipts of the company in money and shares representing money's worth arising from grants by the company of concessions conferring prospecting and other rights in respect of the minerals owned by the company in the territory of Northern Rhodesia were to be included in the income of the company under s. 5 of the Income Tax Ordinance, 1926, of Northern Rhodesia, as revised by subsequent amendments. By s. 5 "income tax shall . . . be payable . . . upon the "income of any person accruing in, derived from, or received in, "the Territory in respect of:—(a) gains or profits from any "trade, business . . . ; (f) rents, royalties, premiums and "any other profits arising from property."

It was admitted that in all the facts and circumstances it was impossible to ascertain the original cost to the appellant company of the mining rights disposed of. The method of computing the appellant company's profits contended for by the respondent and upheld in the High Court of Northern Rhodesia (Law C.J.) and, on appeal, by the Rhodesian Court of Appeal (Hudson P., Lewis and Robinson J.J.), whilst proceeding on the footing that the appellant carried on a trade in the mining rights, denied to the appellant any deduction for the cost thereof when assessing the profits arising from their disposal.

The facts appear fully from the judgment of the Judicial Committee.

1945. July 16, 17, 18, 19. *Donovan K.C.*, *S. Pascoe Hayward* and *H. M. Williams* (of the Northern Rhodesia Bar) for the appellant company. The transactions whereby the appellant company disposed of the mineral rights giving rise to the receipts in issue were transactions by way of trade, and were in law transactions whereby property was sold in return for a price. In calculating the profit arising from the trade so carried on the cost price of the property sold must be deducted. The proper thing to do is either to credit the receipts against the unrecouped balance of the cost to the appellant of the mineral rights, concessions, etc., which amounted to 5,140,383*l.*, or there should be some apportionment of that sum of total cost as between what was sold and what was retained; or else the Income Tax Commissioner of Northern Rhodesia should, as he could under s. 40 of the Income

Tax Ordinance, make an assessment "to the best of his judgment," and allow a deduction. The difficulty of ascertaining the cost price is no justification for refusing any deduction therefor, and for taxing the appellant on the gross proceeds of the sales. There is, in any event, a method of ascertaining the profit to the appellant which, on the evidence of the accountants, is a proper and, indeed, the only method to be adopted in the circumstances of this case, namely, to wait until the unrecouped balance has been made good and then to assess all receipts in full. [Reference was made to the Income Tax Ordinance, 1926, as amended, ss. 2, 5, 6, 7, 10, 12, 35, 40, 44 and 45.] Section 10, on which Law C.J. relied, is, it is submitted, merely dealing with what would be called overhead expenses in this country, and does not bear the interpretation put on it by the learned judge. *Coltness Iron Company v. Black* (1), which turns on the provisions of the English Income Tax Act, has no bearing on the present case, and the attempt to apply it to this case is misconceived. Law C.J. said that the appellant has not discharged the burden of proving that the assessment was excessive: s. 35, sub-ss. 4, 5. It is admitted by the respondent, however, that these are gross receipts. Therefore, since the Ordinance taxes income, the appellant has discharged the onus. If the appellant is right that these are trading receipts, and that something should be allowed for the cost, he has proved that the assessment was excessive, and, in addition, that what has been assessed were not profits or gains under s. 5 at all. If the Board are not prepared to credit the sums against the 5,140,383*l.*, then it is agreed that the Commissioner should exercise the best of his judgment as to the allowance to be given.

S. Pascoe Hayward followed.

Sir David Maxwell Fyfe A.-G., *Cyril King K.C.*, *Reginald Hills* and *E. Unsworth* (of the Northern Rhodesia Bar) for the respondent.

Cyril King K.C. It is not disputed that the receipts are trading receipts of the appellant company. They arise or accrue to the company as a concern which is exploiting—to use a neutral word—commercially its concessions in this territory. Looking at the circumstances of this case, including the terms of the special grants, it is found, with one possible exception, that they are all for a parting by the company with the right for a limited time as against perpetuity, and there is

(1) (1881) 6 App. Cas. 315.

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also the curious feature that there is a reverter in some cases. The case yields on examination to the view that really there is nothing to be set against these receipts, because the company is not, in the accepted sense, selling any part of its concessions. The trade is that of exploiting its concessions by granting licences to others to extract minerals for reward. There are, further, one or two peculiarities in the special grants ; they are all conditional, which counters the proposition that they operate by way of sale ; they were for a period of years only ; payment had in some cases been made to extend the period of the original lease ; in some of the grants the company was described as the owner of the minerals, and in some cases there was a reverter. Also, the rights got under a prospecting licence were subject to forfeiture, and there was evidence that the granting of prospecting licences did not operate as a sale. Those considerations show that there was not a sale. The company is the owner of the minerals, which is also inconsistent with the theory that it has parted with its mineral rights. The true view is that the company is exploiting its rights otherwise than by way of sale through licensees whom it has invited to interest themselves in prospecting parts of the property. The companies to whom the grants are made must expend money on prospecting and development. The company must be looked at as having two classes of capital, and the only class we are looking at is the fixed capital in the form of these mining rights ; circulating capital is not included in that. The opposing views are that on the one hand there is an exploitation, and on the other a parting with the thing. These are chargeable receipts under s. 5 (a) of the Ordinance, and whatever may be set against them by way of expenses of getting them in, at least there cannot in principle be deducted anything on account of the cost of the mineral rights.

With regard to the appellant's claim to pay no tax at all until the balance of 5,140,383*l.* has been paid off, the income tax provisions in the Ordinance cannot be affected by such extraneous considerations. As to assessment by the Commissioner " to the best of his judgment," the taxing authorities took the view that this was a profit which was taxable and so it was taxed, but if the appellant is right that this was a trade receipt, it may be that something must be allowed against the cost of the thing itself, and the difficulty of ascertaining it cannot, of course, interfere with the question of principle. Lastly, the only case presented for the appellant was under

s. 5 (a) of the Ordinance, but the respondent has the alternative of s. 5 (f), which he has kept alive all the time. If s. 5 (f) does not catch the profits from the turning of land to account it would seem that a lot of income tax would be missed. Reliance is placed on the word "premiums" in s. 5 (f); it is submitted that part of the company's incomings consist of a series of premiums, and that nothing can be deducted against that: *Hughes v. Utting (B. G.) & Co. (1)*.

Reginald Hills followed. This is an attempt by the appellant company to get round the well-known principle that in the case of income arising from the exhaustion of minerals no deduction is to be allowed for the cost of the asset. This company is not dealing in the trade of selling mineral rights; its business is to turn to account its mineral rights in the way of trade by getting royalties, rents or premiums, or establishing companies and getting dividends or interest. These incomings will not, under s. 5 (a), be net receipts, because general expenses of running the business of the company have to be deducted. That is how the Crown has always treated this company, and it is the right way—the ownership of the minerals has always been treated as being in the company; there was not a sale of a capital asset.

Donovan K.C. replied, and referred to *Thew v. South West Africa Co., Ltd. (2)*, *Golden Horse Shoe (New), Ltd. v. Thurgood (3)* and *Hughes v. Utting (B. G.) & Co. (1)*. The appellant company is entitled to some deduction in respect of the cost of the subject-matter disposed of, and it has discharged the onus of showing that the assessment was excessive. It being admitted that no-one can calculate the original cost, the sections of the Ordinance which give the Commissioner power to assess to the best of his judgment cover this case. The appellant did take the point below that the case should be remitted. If the appellant is right in saying that it has disposed of rights for a price, s. 5 (f) has no application, because the price is not the income from the property, but it is the property itself, and on that footing it would be taxable, if at all, as a receipt of a trade.

Oct. 29. The judgment of their Lordships was delivered by VISCOUNT SIMON. This appeal, from a judgment of the

(1) [1940] A. C. 463, 467, 477.

(3) [1934] 1 K. B. 548.

(2) (1924) 9 Tax Cas. 141, 149,

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Rhodesian Court of Appeal which affirmed a judgment of the High Court of Northern Rhodesia, raises the question whether certain additional assessments to income tax made in Northern Rhodesia on the appellant company, the British South Africa Company, for the years ending March 31, 1938, 1939 and 1940, were validly made and ought to be upheld. Inasmuch as the issue, in their Lordships' opinion, ultimately turns on the nature of the business carried on by the company and of the receipts, in respect of which the assessments in question were made, a consideration of the company's history and of its transactions in relation to these receipts is necessary.

The company was incorporated by Royal Charter on October 29, 1889. The Charter recites the petition by the Duke of Abercorn and others associated with him for incorporation, and that the existence of a powerful British company controlled by Her Majesty's subjects in whom she had confidence, and having its principal field of operations in that region of South Africa lying to the north of Bechuanaland and to the west of Portuguese East Africa, would be advantageous to the commercial and other interests of Her Majesty's subjects in the United Kingdom and the Colonies, and that the petitioners desired to carry into effect divers concessions and agreements which had been made by certain of the chiefs and tribes inhabiting the said region and such other concessions, agreements, grants and treaties as the petitioners might thereafter obtain within the said region or elsewhere in Africa with the view of promoting trade, commerce, civilization and good government as therein mentioned, and that the success of the enterprise in which the petitioners were engaged would be greatly advanced by a Royal Charter of Incorporation.

By cl. 2 of the Charter the company was authorized and empowered to hold, use and retain for the purposes of the company, and in the terms of the Charter, the full benefit of the concessions and agreements made as aforesaid so far as they were valid, or any of them, and all interests, authorities and powers comprised or referred to in the said concessions and agreements. Other clauses gave the widest administrative powers to the company, and cl. 24 gave it special authority "(v.) to carry on mining and other industries, and to make "concessions of mining, forestal or other rights," and "(xii.) to "carry on any lawful commerce, trade, pursuit, business, "operations, or dealing whatsoever in connexion with the "objects of the company." The Charter contemplated that

the objects of the company would be further defined by a Deed of Settlement. Such a deed was executed on February 3, 1891, and it was by its third article declared that the company was formed, *inter alia* :—“(2.) To undertake and carry on the “government or administration of any territories districts or “places in Africa, and therefor and therein to make laws and “ordinances, and to impose and levy taxes, and raise revenue, “and to establish and maintain a force of police. (3.) To provide for and promote the welfare of the inhabitants of Africa, “the advancement of civilization, and the development of “trade. (4.) To negotiate and carry into effect treaties and “arrangements with any Chiefs, Rulers, Governments or “Authorities (Supreme Local or otherwise) in Africa and “elsewhere; and to subsidize any such Chiefs, Rulers, “Governments or Authorities. (6.) To prospect explore “examine and investigate countries territories places undertakings properties and claims of all kinds, and to organize “conduct assist and subsidize expeditions surveys investigations experiments and testing operations of all kinds, and “to collect train employ and furnish experts for any such purposes. (7.) To form organize promote subsidize and assist “companies syndicates partnerships institutions and associations for any purposes conducive to the interests of the “Company, and to hold shares in any company or corporation.”

The principal concession in existence at the date of the Charter was that dated October 30, 1888, by which Lobengula, King of Matabeleland, Mashonaland and other adjoining territories granted to a Mr. Rudd (who assigned it to, or held it on behalf of, the company) “the complete and exclusive “charge over all metals and minerals situated and contained “in my Kingdoms, Principalities and Dominions, together with “full powers to do all things that they may deem necessary to “win and procure the same and to hold, collect and enjoy the “profits and revenues, if any, derivable from the said metals “and minerals, etc.” The territory over which these rights were granted corresponds roughly with what is now Southern Rhodesia. Subsequently the company acquired numerous further concessions of which may be noted :—(1.) On July 25, 1893, the sole and exclusive right to search for, work and win precious stones and minerals in the Khamis country (now the Bechuanaland Protectorate); (2.) on September 25, 1893, under documents styled “Certificate of Claim,” the sole mining rights over certain territories in Central Africa (now included

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in the territories of Northern Rhodesia and Nyasaland); (3.) on October 17, 1900, from Lewanika, the Paramount Chief or King of the Barotse nation, the sole and exclusive right to carry on any trade and to search for, win and keep precious stones and minerals in the territory of Barotseland (now included in Northern Rhodesia); and (4.) on August 11, 1909, from Lewanika the right to certain Barotseland land subject to certain conditions.

The company, thus incorporated with powers of the widest range, for upwards of thirty years administered at its own expense the territory now known as Southern Rhodesia and the territories north of the Zambesi river, which were subsequently amalgamated and are now comprised in the Protectorate of Northern Rhodesia. In the year 1923 a great change in the character of the company took place. On September 29 of that year it made an agreement with the then Duke of Devonshire, as Secretary of State for the Colonies, whereby it agreed to relinquish its administration of Southern Rhodesia as from October 1, 1923, and of Northern Rhodesia as from April 1, 1924. This agreement it duly carried out, and thereafter became a purely trading and commercial company. Under the same agreement, which was a comprehensive settlement of matters in dispute between the Crown and the Company in relation to both territories, the company received from the Crown the sum of 3,750,000*l.*, being the agreed excess of its administrative expenditure over its administration revenue in the two territories, and was also recognized by the Crown as the owner of the mineral rights throughout Southern and Northern Rhodesia. The company appears throughout to have distinguished between its administration and its commercial outgoings and receipts. It had, during the same period, incurred very large expenditure of a commercial character on the acquisition, maintenance and development of its trading assets, and it was a fact agreed between the parties in the proceedings, in which this appeal is brought, that "as at "September 30, 1923, the unrecouped balance of the cost to "the British South Africa Company of the mineral rights, "concessions, land and land rights situate in Southern Rhodesia, "Northern Rhodesia, Nyasaland and Bechuanaland Protec- "torates belonging to the British South Africa Company "amounted to 5,140,383*l.* 17*s.* 2*d.*" In 1933, the company sold its mineral rights in Southern Rhodesia to the Government of that Colony for 2,000,000*l.*, and it is a further agreed fact that

as a result of the receipt of this sum and of the disposal of other assets of the company the above-mentioned unrecouped balance was reduced on September 30, 1939, to 924,289*l.* 15*s.* 5*d.*

Before examining the specific transactions which led to the assessments now under review it will be convenient to refer to the law and practice in regard to mining rights in Northern Rhodesia. As appears from the preamble to the Mining Proclamation of 1912, it is based on a recognition of the title of the company to the right of searching and mining for, and disposing of, all minerals and mineral oils in Northern Rhodesia. It is therefore from the company that any mining rights under the Proclamation must be derived. These are either in the form of a "prospecting licence," or a "special grant." The former is defined by the Proclamation as a "licence granted by the British South Africa Company to any person authorizing him to acquire any mining right within the limits of this Proclamation," and in regard to the latter it is provided that the following shall be deemed to be special grants:—"(1.) Any mining right within the limits of this Proclamation acquired from the British South Africa Company subsequent to the commencement of this Proclamation otherwise than by issue of or under a prospecting licence; (2.) any mining right acquired from the British South Africa Company within the limits of this Proclamation and before its commencement which relates to areas of greater extent than the forms of location ordinarily applicable to reef or other deposits."

It is with certain "special grants" that this appeal is concerned, but it is necessary first to consider the nature of a prospecting licence. The common form of prospecting licence is annexed to the Proclamation. It is expressed to be "Available for one year only from date of issue" and to be "Not transferable," and to be issued by the company to the named licensee who agrees to the accompanying conditions. These conditions constitute the contract between the holder of the licence and the company, and their importance for the present purpose lies in this, that cl. 53 of the Proclamation, which deals mainly with prospecting licences, provides that its provisions shall, except where they are inconsistent with the provisions of a special grant, apply to such grant and the holders thereof. The conditions provide, inter alia, (by cl. 4) for the company having a paramount first charge for rents, royalties and other moneys due to it on the licence and every mining location and interest whatsoever acquired under it, and other property as

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therein mentioned, (by cl. 6) for forfeiture in certain events, (by cl. 7) for registration of the licence, (by cl. 8) for the rights of the licensee for one year from the date of issue to prospect and work for minerals in Northern Rhodesia in accordance with the conditions of the licence and the provision of the mining laws for the time being in force, and during the same to acquire under it and peg off one mining location. Clause 10 defines the form and extent of mining locations. Clause 14 provides that (except as therein mentioned) every registered mining location shall be held by the registered holder thereof on joint account with the company in the proportion of two-thirds by the registered holder and one-third by the company, and cl. 15 that no registered mining location shall be worked for profit, except as therein mentioned, until the terms on which such working for profit shall be permitted have been arranged with the company. Clause 16 enables the holder to submit to the company details of a scheme whereby his location may be discharged from the two preceding conditions and worked for profit. Clause 17 provides for the payment of rents and royalties by a registered holder, and cl. 18 for development by him. In an annexe to the conditions the company gives notice that if satisfied on the matters therein mentioned it will entertain proposals for the commutation of its interest in the property (that is, its one-third interest under cl. 14) on a share basis (that is, the company taking shares in a company formed to acquire the property) or on a royalty basis. The Proclamation repeats and gives effect to some of the contractual conditions of the prospecting licence, and makes certain other provisions. Under s. 6 the holder of a prospecting licence must first register his licence. By s. 7 he is given, in addition to the rights of prospecting for and working minerals and of pegging off a mining location thereby conferred, certain ancillary rights on and over a prescribed area of land. Section 9 authorizes him, if he exposes or opens up a reef as therein mentioned, to post a "discovery notice," and under s. 10, the posting of a discovery notice confers on him for thirty-one days the exclusive privilege of prospecting over the area defined in the section. Section 11 authorizes him, within the same period, to peg off a mining location of such form and area as may be authorized by the licence and to post a "registration notice" in respect of it. Under s. 13 he must apply for and obtain a certificate of registration of his mining location. By s. 23 the holder of a mining location is given certain surface rights, and by s. 26

he is given "so long as he is bona fide in pursuit of his prima facie rights" the right of working and extracting any of the minerals which he is entitled to win under the prospecting licence by virtue of which the location was acquired until such time as is mentioned in the section. Section 27 enables the holder of a mining location, if he is entitled to do so under the terms of his licence, to apply for and obtain a certificate of "special registration," and under s. 28 such a certificate, subject to the provisions of the Proclamation, confers on the holder an indefeasible title to all the surface and mining rights appertaining to such location, and such a location is not thereafter to be subject to forfeiture, though the registered holder will continue to be subject to all other obligations, liabilities and provisions subject to which the location was held before the issue of this certificate. Sections 36 and 38 provide for the abandonment in certain events by the holders of unregistered and registered locations. Section 53 (dealing with special grants) has already been mentioned. Section 57 provides that so soon as a certificate of registration has been issued in respect of any special grant (for which provision is now made by the amending Ordinance, No. 6 of 1927) the provisions of the Proclamation shall mutatis mutandis, and in so far as they are not inconsistent with the provisions of such grant, be deemed to apply to such grant as if such grant were a mining location.

Having referred to the constitution of the company under its Charter, to certain events in its history and to the background of mining law and practice under which it operated, their Lordships must now consider the particular transactions which gave rise to the disputed assessments. These transactions fall into three groups, in which three separate limited companies were concerned (1.) Loangwa Concessions (Northern Rhodesia), Ltd., which will be called "Loangwa," (2.) Rhokana Corporation, Ltd., which will be called "Rhokana," and (3.) N'Changa Consolidated Copper Mines, Ltd., which will be called "N'Changa." It is not disputed that the agreements into which the company entered with those companies constituted "special grants" within the meaning of the Proclamation.

The transaction with Loangwa was briefly as follows:—

(1.) By an agreement of May 17, 1928, the company granted to Loangwa the exclusive right to prospect for minerals other than precious stones until April 30, 1933, and the right within that period of marking out mining claims over a prescribed area. The consideration for this grant included (a) 200,000 fully paid

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shares of 5s. each in Loangwa and a right to subscribe for further shares, (b) the right to an allotment of shares in such other company as was therein mentioned, and to subscribe for shares in such company, and (c) the right of appointing certain directors. Under this agreement Loangwa undertook to spend certain minimum amounts, varying between 60,000*l.* and 100,000*l.* annually, in the areas comprised in the grant, and were entitled to obtain further extensions of the period of the grant up to April 30, 1935. Provision was also made for payment of royalties to the company. (2.) By a second agreement, of November 14, 1929, the company made a special grant to Loangwa over an additional area on substantially the same terms. (3.) By a third agreement, of January 5, 1933, the company extended the period of the aforesaid grants to December 31, 1940, in consideration of receiving further shares in Loangwa. (4.) By a fourth agreement, of July 11, 1935, the consideration payable under the preceding agreement was varied and became 50,000 fully paid shares of 5s. each. The par value of these shares was 12,500*l.*, and it is the sum of 12,500*l.* which is the first item of assessment disputed in this appeal.

The transaction with Rhokana was as follows :—

(1.) By an agreement of June 14, 1928, the company granted Bwana M'Kubwa Copper Mining Co., Ltd. (hereinafter called "Bwana M'Kubwa") rights substantially similar to those granted to Loangwa in respect of another area for the period from December 1, 1929, to December 31, 1930, subject to a right of extension. The consideration was the payment to the company of 5,000*l.*, and, in the event of the period of the grant being extended, a further 5,000 annually during such extension. This agreement will be referred to as "the new "N'Kana grant." (2.) By an agreement of December 9, 1929, the company granted to Rhokana under its then name of The Rhodesian Congo Border Concession, Ltd., rights under certain conditions to mark out mining areas in defined localities and to receive, subject to the terms of the agreement, special grants in respect of such mining areas and also the exclusive right to prospect for minerals from January 1, 1930, to April 30, 1935. The consideration was to be, inter alia, a specified proportion of shares in any companies formed to work the areas for profit, and Rhokana undertook not to work the areas for profit except through a company or companies formed for the purpose. This agreement will be called "the R.C.B. grant." (3.) By an

agreement of April 1, 1931, between the company, Bwana M'Kubwa and Rhokana the rights and obligations under the new N'Kana grant were assigned to Rhokana. (4.) By an agreement of August 28, 1931, the company granted to Rhokana for the period from March 6, 1931, to April 30, 1935, the exclusive right within the area known as the Balovale area in Northern Rhodesia to prospect for minerals (other than as therein mentioned) and to mark out mining locations. This agreement will be referred to as "the Balovale grant."

(5.) By a further agreement, of February 24, 1932, between the company and Rhokana the terms of the new N'Kana, R.C.B. and Balovale grants were varied for the consideration therein mentioned. (6.) By a final agreement, of October 20, 1932, between the company and Rhokana, expressed to be supplemental to the foregoing agreements, the period of the rights thereby conferred was extended from April 30, 1935, to December 31, 1940, subject to the spending of specified amounts on prospecting. For this extension Rhokana agreed to pay to the company the sum of 5,000*l.* on January 1 in each of the years 1935 to 1940 inclusive. The first three of these sums of 5,000*l.* are the second of the items of disputed assessment.

The transaction with N'Changa was as follows :—

By an agreement of September 1, 1937, between the company, Rhonaka and N'Changa, after recitals whereby it appeared that Rhokana was desirous of exercising its right under the R.C.B. grant to mark out two specified mining areas, that Rhokana had agreed to assign this right to N'Changa, and that the company had agreed to make to N'Changa a special grant of mining rights in the selected areas, Rhokana surrendered its rights under the R.C.B. grant over the areas in question and the company granted to N'Changa the sole and exclusive right of searching and mining for, and keeping or disposing of, minerals found therein. The consideration for this grant was 2,500 fully paid shares of one pound each in N'Changa to be allotted to the company.

The sum of 2,500*l.*, the par value of these shares, is the third item of disputed assessment.

These several items can now be conveniently summarized. The company received :—

In respect of the year ending September 30, 1936 :

(a) 50,000 5 <i>s.</i> shares in Loangwa at par . .	12,500 <i>l.</i>
(b) in cash from Rhokana	5,000 <i>l.</i>
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	(c)	2,500 shares of 1 <i>l.</i> each in N'Changa at	
		par	2,500 <i>l.</i>
	(d)	in cash from Rhokana	5,000 <i>l.</i>
			7,500 <i>l.</i>
	In respect of the year ending September 30, 1938 :		
	(e)	in cash from Rhokana	5,000 <i>l.</i>

On March 26, 1940, the respondent, the Commissioner of Income Tax in Northern Rhodesia, made additional assessments on the company for the years ending March 31, 1938, 1939 and 1940, in respect of the items specified above. The amounts of such assessments were the full sums of 17,500*l.*, 7,500*l.* and 5,000*l.* respectively.

The Ordinance, under which the assessments were made, was the Income Tax Ordinance of Northern Rhodesia of October 16, 1926, as from time to time amended. It is necessary to refer only to a few of its provisions. By s. 2 "chargeable income" is defined to mean the aggregate amount of the income of any person from the sources specified in s. 5 after allowing the appropriate deductions and exemptions under the Ordinance. Section 5 is the charging section, and provides "Income tax" shall, subject to the provisions of this Ordinance, be payable "at the rate or rates specified hereafter for the year of assessment commencing on the 1st day of April, 1926, and for each "subsequent year of assessment upon the income of any person "accruing in, derived from, or received in, the Territory in "respect of—(a) gains or profits from any trade, business, "profession or vocation ; (c) the annual value of land "and improvements thereon used by or on behalf of the owner "or used rent free by the occupier for the purpose of residence "or enjoyment, and not for the purpose of gain or profit ; "(f) rents, royalties, premiums and any other profits arising "from property." Section 6 provides that tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment, while s. 7 provides for special periods of assessment. Section 10 provides that for the purpose of ascertaining the chargeable income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year preceding the year of

assessment by such person in the production of the income. Amendments, which can be disregarded, have been made to this section since the relevant date. Certain other provisions of the Ordinance will be referred to later.

It is now necessary to recur to the additional assessments which are in dispute. These were all made in the first place on the footing that all the receipts in question came under s. 5 (f) of the Ordinance. They were all described in the notices of assessment as "Rents, royalties, premiums and profits arising from property." To these notices objection was duly taken by the company. The grounds of objection to the assessment in the sum of 17,500*l.* for the year ending March 31, 1938, may be taken as typical. They were (1.) that neither the said sum of 17,500*l.* nor any part thereof (whether representing cash or shares) consisted of rents, royalties, premiums or profits arising from property; (2.) that neither the said sum of 17,500*l.* nor any part thereof was income within the meaning of the Ordinance, but was a gross receipt of the company's trade which so far had yielded no ascertainable profit; (3.) that in any event neither the said sum of 17,500*l.* nor any part thereof was "income . . . accruing in, derived from, or received in the Territory," but accrued in, was derived from and was received in the United Kingdom; (4.) that the whole of the said sum of 17,500*l.* was a capital receipt; and (5.) that the said assessment was excessive in amount. The third ground of objection was not argued before their Lordships. It was rightly conceded that it was not tenable in view of their earlier decision in *Liquidator, Rhodesia Metals, Ltd. v. Commissioner of Taxes* (1). The fifth ground of objection does not appear to raise any further point. The Commissioner for Income Tax disallowed the objections and, in disallowing them, made the alternative claim (to which anticipatory objection had been raised) that the receipts in question were "alternatively gains or profits from a trade or business," thus falling within s. 5 (a) of the Ordinance.

From the Commissioner's disallowance the company appealed to the High Court of Northern Rhodesia. The learned Chief Justice (Law C.J.) dismissed the appeal, rejecting the contention that the receipts in question fell within s. 5 (f) of the Ordinance, but upholding the alternative claim of the Commissioner that they were gains or profits from the company's trade. From this judgment the company appealed to the Rhodesian Court of Appeal, while the Commissioner cross-appealed against the

(1) [1940] A. C. 774.

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judgment that the receipts in question did not fall within s. 5 (f). The Court of Appeal (Hudson P., and Lewis and Robinson JJ.) unanimously dismissed the company's appeal, holding that the case fell within s. 5 (a), and they did not find it necessary to express any final opinion on the cross-appeal.

The company has now appealed: there has been no cross-appeal by the Commissioner, but it is conceded, and the argument before their Lordships has proceeded on the footing, that it is open to him to support the assessments under either s. 5 (a) or s. 5 (f). It is convenient first to deal with the claim that the sums in question fall within s. 5 (f). On this point their Lordships are in agreement with the learned Chief Justice. After an examination of the several transactions he came to the conclusion that in each case the sum received was the price paid on a transfer of property: thus, the sum of 2,500*l.* (being the par value of the shares received from N'Changa) was in his opinion "a fixed price paid on an outright transfer of certain "benefits": the several sums of 5,000*l.* in cash received from Rhokana were the consideration received on a transfer: "the "transaction was a transfer for a price, or, in other words, a "sale": and so, also, with the other items. In their Lordships' opinion this is an accurate analysis of the transactions, and, if so, the sums received cannot be regarded as "rents, royalties, "premiums and any other profits arising from property," an expression which implies that the property, from which the rents, royalties, premiums or other profits arise, remains in substantially the same condition in the possession of its owner, and is not consistent with the property itself being transferred. This is sufficient to dispose of the claim under this head, but it appears to their Lordships that it fails on another ground. It may be possible—on this question no decision is necessary—for the same receipts to fall under more than one sub-section of s. 5. But since it is clear that the company carries on a trade, the exact nature of which will presently be discussed, and the sums in question were received in the course of that trade, it does not appear a legitimate application of the section to segregate these sums from the other earnings of the company which fall to be taxed under s. 5 (a) and tax them separately under s. 5 (f).

The more difficult question arises under s. 5 (a). In the courts of Rhodesia the argument of the company was largely influenced and directed by a fact which was agreed between the parties, namely, "that it is impossible to allocate any portion

“ of such cost [i.e., the sums of 5,140,383*l.* 17*s.* 2*d.* and 924,289*l.* 15*s.* 5*d.* to which reference has already been made] to any one or other of the individual assets described above [i.e., the mineral rights, concessions, land and land rights acquired by the company] or any blocks of such assets or as between the total of such assets situate in Northern Rhodesia and the total of such assets situate in any or all of the other territories.” Therefore the company, while contending that there could be no gains or profits from its trade in respect of the sums in question until the cost of the assets realized had been brought into account, was faced by the fact that by its own admission the cost could not be ascertained. It therefore contended that the proper and, indeed, the only method by which its gains or profits could be determined was to wait until the whole of the unrecouped balance of expenditure had been made good and thereafter to assess all receipts in full. In this contention the company claimed the support of the expert evidence of accountants that thus only could its profits be ascertained and of an arrangement made with the Inland Revenue Authorities in the United Kingdom that for the purpose of British income tax it should be thus assessed. Their Lordships can see no justification in law for this contention. It is no doubt true from the point of view of accountancy that there is no other way of finding the company’s ultimate profit, and equally it may be a convenient arrangement if the taxing authority chooses to adopt it. But it is impossible to find support for it in the terms of the Ordinance. The question under the Ordinance is, what is the income of the company in the particular year of assessment, and it must be answered by applying its relevant provisions as best they can be applied, not by introducing some new and supposedly more convenient method of ascertainment. But while their Lordships cannot uphold this, the primary argument of the company, they are yet of opinion that the judgments of the courts of Rhodesia cannot be supported. For the question still remains, what is the nature of the receipts in question? The Commissioner claims that they must be brought into account as gains or profits under s. 5 (a) without any deduction, not because the cost of any particular asset is not ascertainable, but because in law no deduction is permissible, and this contention has found favour with the courts in Northern Rhodesia, though in the judgment of Law C.J., and to a lesser degree in the judgment of the Court of Appeal, importance is attached to the admission that cost could not be ascertained.

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The principles applicable to such a case as this are not in doubt. For the purpose of assessment to income tax (and here there appears to be no distinction between British and Northern Rhodesian tax) the proceeds of sale of an asset are brought into account if the sale is in the course of the taxpayer's trade or business. Thus, if it is his trade or business to make and to sell, or to acquire and to sell, shoe-making machinery, then the proceeds of sale of such machinery are brought into account: if it is his trade to make and sell shoes, and for that purpose he owns and uses shoe-making machinery, then if he sells such machinery, the proceeds of such sale are not brought into account. In the former case the machinery is sometimes called "floating" or "circulating" capital, in the latter "fixed" capital. In the former case the gain or profit arising from the sale cannot be ascertained until its cost has been ascertained: in the latter no question of cost arises, the receipts are sometimes referred to as "capital receipts," and no tax is payable. In the present case the company has contended as an alternative ground of objection to assessment that the sums in question were "capital receipts," but this contention appears to their Lordships to be not well founded and, indeed, was not seriously pressed in argument. The company's substantial claim is that the receipts were in the course of its trade: it was its trade (so runs the argument) to acquire and dispose of, inter alia, mining rights, and on a sale or other disposition of such rights there could be no gain or profit under s. 5 (a) until the cost had been brought into account.

The answer to this contention is thus stated in the judgment of Hudson P. "Such payments are income derived by the " company from the business of turning to account its rights " under its concessions of winning and disposing of minerals by " participating in the proceeds of the exploitation of such rights " by its licensees. The income is, therefore, taxable under " s. 5 (a) of the Ordinance as being the profits or gains of a trade " or business and the only deductions allowable are the " administrative expenses of the company," a statement which was substantially embodied in the formal reasons presented by the respondent to their Lordships' Board. If, however, the business of the company was (as, in their Lordships' opinion, it was) to "turn to account" its mining rights or other property, it does not follow that the proceeds of such turning to account are chargeable to tax without any deduction for the cost of acquisition. Rather it would seem that the ordinary rule must

apply, and that no gain or profit can be said to arise unless and until a balance has been struck between the cost of acquisition and the proceeds of sale. Nor is it, in their Lordships' opinion, material that in dealing with its mineral rights the company has retained an interest either by way of a possible reverter of the property or by a shareholding in a company to which it made a special grant.

The present case finds an analogy in *Thew v. South West Africa Co.* (1), though it is not desirable to press too closely decisions under a different taxing Act. In that case the question, which arose under the English Income Tax Act, was whether "in computing the profits arising from the trade, "adventure, or concern in the nature of trade carried on by "the company profits derived from the sales of land ought to "be taken into account." The company had been formed to acquire, purchase, and turn to account certain concessions, which included rights in respect of minerals, railways and lands. Rowlatt J. stated the question simply and decisively: "Is the "article acquired for the purpose of trade?" and, coming to the conclusion that it was, decided that the profits arising from its sale must be brought into account. But it is to be observed that no question was raised as to the set off of the cost of the article. This was assumed, but the company contended that the proceeds of sale of land were "capital receipts" and need not be brought into account at all, as had been successfully contended in *Hudson's Bay Co. v. Stevens* (2).

There is, however, another class of case on which the respondent relies. The learned Chief Justice had to some extent founded on the decision in *Coltress Iron Co. v. Black* (3), a case which arose under the English Income Tax Act then in force in relation to the profits derived from working a mine. The respondent, properly appreciating that that decision turned on statutory provisions which had no counterpart in the Ordinance, did not press the case before their Lordships, but he urged that the true analogy is to be found in such cases, decided under the English Income Tax Acts, as *Alianza Co., Ltd. v. Bell* (4), which establish that where the income of a taxpayer is derived from the exhaustion of a capital asset no deduction can be allowed for the cost of that asset. Their Lordships do not wish to throw any doubt on the validity of that principle in English

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(1) 9 Tax Cas. 141.

(2) (1909) 5 Tax Cas. 424.

(3) 6 App. Cas. 315.

(4) [1905] 1 K. B. 184; [1906] A. C. 18.

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law in cases to which it can be properly applied and, without deciding it, are content to assume that it may be applicable also under the income tax law of Northern Rhodesia. But it appears to them that it is excluded as soon as the conclusion is reached that the article sold is that which it was the business of the company to acquire and to sell. So, here, though the mixed character of the company's objects as stated in the preamble of its Charter makes it difficult to define its trade or business, yet it appears reasonably clear that in order to effectuate its desire (to use the words of the preamble) "to carry into effect divers concessions and agreements . . . and such other "concessions agreements grants and treaties as the petitioners "may hereafter obtain" the acquisition and realization of mining rights must take a leading place.

If this conclusion is reached, it becomes, as has already been pointed out, immaterial what method is adopted by the company for the development and realization of its asset. In his elaborate and careful judgment in the Court of Appeal the learned President lays great stress on the fact that the company in effect participated in the results of the winning of minerals by prospectors, and it is this consideration that leads him to the conclusion that against the profits derived from such participation no allowance for cost can be made. The relevant transactions have already been stated in sufficient detail: they are, in their Lordships' opinion, in substance indistinguishable from outright sales of mining rights. But even if they are to be distinguished by the fact that the company remains interested as a shareholder in other companies in the winning of minerals, this is not a difference which affects the position for income tax purposes. The company is still realizing in the way that appears most advantageous the asset which it is its business to acquire and realize. It is to be observed that, if the company itself embarked on mining operations, different considerations would arise. It would then be subject to, and entitled to the benefits of the provisions of s. 11, sub-s. 2, of the Ordinance and its amendments.

Their Lordships are of opinion, therefore, that the judgment of the Court of Appeal cannot stand as it is. The question remains, what is the proper course now to be taken? It was agreed by counsel on the hearing of this appeal that the figures, on which the additional assessments now under review were based, appeared in the returns made by the company. It is provided by s. 40, sub-s. 2, of the Ordinance that "where a

"person has delivered a return the Commissioner may—
 "(a) accept the return and make an assessment accordingly ;
 "or (b) refuse to accept the return and, to the best of his
 "judgment, determine the amount of the chargeable income of
 "the person and assess him accordingly." The Commissioner,
 acting presumably under this sub-section and under s. 41 of the
 Ordinance, has made the disputed additional assessments.
 In doing so he has exercised his judgment on a wrong principle,
 for he has assumed that the receipts in question are chargeable
 without deduction. The company has, in their Lordships'
 opinion, discharged the onus which lies on it of proving that
 the assessments are excessive, for it is clear that some deduction
 should be allowed. In the circumstances it appears to their
 Lordships to be the proper course to refer the matter back to
 the Commissioner for re-assessment "to the best of his
 "judgment." An opportunity will thus be given to the com-
 pany to submit such considerations in regard to deductions in
 respect of these particular receipts as appear to them relevant
 and reasonable and to the Commissioner, having weighed them,
 to make a re-assessment on the proper basis at what he judges
 to be the appropriate figure. The Commissioner must pay the
 costs of the company of this appeal and in the courts of
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Solicitors for appellant : *Coward, Chance & Co.*

Solicitors for respondent : *Burchells.*

[PRIVY COUNCIL.]

KWAKU MENSAH APPELLANT ;
 AND
 THE KING RESPONDENT.
 ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

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 Nov. 7.

*West Africa—Criminal law—Murder conviction—Non-direction on
 provocation—Substitution of verdict of manslaughter—Constitution
 of Court of Appeal—Acting judge—Courts Ordinance (Gold Coast),*

* *Present* : LORD PORTER, LORD GODDARD and SIR JOHN BEAUMONT.

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No. 7 of 1935, s. 9—*West African Court of Appeal Orders in Council (No. 2 of 1935) Consolidated*, ss. 2, 5.

An acting judge of the Supreme Court of the Gold Coast appointed under s. 9 of the Courts Ordinance, No. 7 of 1935, has, during the period of his appointment, all the powers of an ordinary judge. He is a "person for the time being performing the duties "of such office" within the meaning of s. 2 of the West African Court of Appeal Orders in Council (No. 2 of 1935) Consolidated, and it is unnecessary that he should first have acted as a judge in some other cause or matter before he is qualified under s. 5 of the Orders in Council to sit in the West African Court of Appeal.

Butler v. The King [1939] A.C. 484, inapplicable.

If, when a person is tried on a charge of murder, there arises on the whole of the evidence a question whether or not the offence might be manslaughter only, on the ground of provocation or any other ground, then, whether the defence has relied on it or not, the judge must put that question to the jury.

Ruling in *Rex v. Hopper* [1915] 2 K.B. 431, approved in *Mancini v. Director of Public Prosecutions* [1942] A.C. 1, referred to and applied.

Accordingly, where the appellant, who was charged with, and convicted of, murder, had alleged that while acting in defence of his property he had been stabbed by the deceased shortly before he accidentally shot him, but the prosecution's case was that the appellant had been stabbed in consequence of an attempt by him to steal from or injure the deceased, the direction to the jury that the question of manslaughter could only arise if they accepted the accused's evidence that the shooting was accidental was wrong. If the appellant's case was true, the stabbing would have amounted to provocation, and the jury should have been directed to consider the respective versions, which would have enabled them to say whether there was provocation in fact. The direction had accordingly resulted in a failure to take the opinion of the jury on a matter which, had they accepted the evidence, might have avoided a conviction for a capital crime. The omission to place before the jury for their consideration a matter of such grave importance justified the intervention of the Board in the exercise of their criminal jurisdiction, although the matter had not been raised in the courts below or in the printed case for the appellant.

Mancini v. Director of Public Prosecutions [1942] A.C. 1 referred to.

Whether in the circumstances provocation was such as to deprive an ordinary person of self-control, and whether sufficient time had elapsed to enable control to be regained, are questions for the jury.

Rex v. Hayward (1833) 6 C. & P. 157, and *Rex v. Thomas* (1837) 7 C. & P. 817, referred to.

Case remitted to the West African Court of Appeal with a direction to substitute a verdict of manslaughter for that of murder.

APPEAL (No. 7 of 1945), by special leave, from a judgment of the West African Court of Appeal (Gold Coast Session) (August 18, 1943), which dismissed the appellant's appeal against his conviction and sentence of death on a charge of murder of one Abudu Zabrama before Lane J. in a Special Divisional Court of the Supreme Court of the Gold Coast and a special jury (May 13, 1943).

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The following facts are taken from the judgment of the Judicial Committee. It appeared that in the early morning of November 27, 1942, the deceased man, Abudu Zabrama, with some of others of his tribe, the Zabrama, arrived at the village of Kajakron, where the appellant lived, carrying bundles of cloth which they were intending to smuggle into French territory. According to the witnesses for the prosecution they reached the village when it was light, either just before or just after daybreak, while according to the defence they arrived in the dark when the villagers were asleep. An alarm was given by someone, and there were cries of "thief" and a fight ensued. The theory of the prosecution was that the villagers attacked the Zabrama with the object of stealing the goods they were carrying. On the other hand, the case for the defence was that the incident started because the tribesmen, or some of them, including the deceased, entered the compound of the appellant and tried to break into his home. However the fracas started, there seemed to be no doubt that in the course of the fight the appellant was stabbed, receiving a wound some four inches long on his hip, and according to his evidence it was inflicted by the deceased. The Zabrama, being outnumbered, made off to the Mohammedan part of the village, the Zongo. The deceased, who was being chased by the appellant, among others, entered a house and was followed by some of the villagers, still calling out "thief." The deceased ran out of the house and, as he was running away, the appellant fired a gun and killed him.

The appellant and nine others of the villagers were charged with murder, the appellant as a principal in the first degree and the others as abettors. The sole defence set up at the trial on the part of the appellant was that he presented the gun with the object of frightening the deceased and inducing him to surrender. The learned judge (Lane J.) in the course of his summing up directed the jury that there were three possible verdicts that they could return, murder, manslaughter and acquittal, and that in his opinion no verdict of manslaughter could be entered unless the jury accepted the appellant's own

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account as to how he shot the deceased. He further directed them that if they did accept that account the appellant would be guilty at least of manslaughter, as pointing a gun at the deceased as he was running away was an unlawful act. The jury found the appellant guilty of murder, but the other nine accused were found by them guilty only of manslaughter. On appeal, the West African Court of Appeal (Petrides C.J. (Gold Coast), Fuad J. (Gold Coast) and Quashie-Idun Ag. J. (Gold Coast)), dismissed the appeal of the present appellant, holding that though in their opinion there was a misdirection in saying that on the appellant's own evidence he was at least guilty of manslaughter, the jury must have rejected his evidence as was shown by their returning a verdict of murder. With regard to the remaining accused they quashed the conviction on the ground that the jury should have been directed that in their case the only possible verdicts were murder or acquittal. The case of those other nine accused was not before the Board.

1945. Oct. 10, 11. *Sir Alfred Wort and Dingle Foot* for the appellant. There are two questions ; first, whether the West African Court of Appeal was constituted in accordance with law—it is submitted that it was not ; and secondly, on the merits, the evidence and circumstances were such that both in law and justice it was impossible to convict the appellant of murder. With regard to the first point, the Court of Appeal consisted of three judges, one of them, Mr. Quashie-Idun, was a district magistrate who was appointed by the Governor to act as a judge of the Supreme Court of the Gold Coast with a view to his sitting in the West African Court of Appeal. So far as the Supreme Court is concerned the Governor of the Colony had a right, under s. 9 of the Courts Ordinance, No. 7 of 1935, in certain circumstances to appoint a person in the room of a judge who was absent through illness, etc., but the Governor had nothing to do with the Court of Appeal. The constitution of that court fell within the province of the Chief Justice of the Gold Coast or the Chief Justice of Nigeria under s. 12, sub-s. 1 (a), of the West African Court of Appeal Orders in Council, 1928–35, Consolidated. The Chief Justice of the Gold Coast or of Nigeria, as the case may be, and not the Governor, can therefore appoint to sit in the Court of Appeal permanent judges of the Supreme Court and those persons who are for the time being performing the duties of such office. There are two points to be noticed in regard to this : (a) Mr. Quashie-Idun, on the facts here,

was not appointed to fill the vacancy of any particular person ; and (b) he was not performing the duties of a judge of the Supreme Court. The appointment here, therefore, did not comply with the provisions of the Act and was invalid. The statute must be construed strictly, and the point is that he was not eligible for the Court of Appeal because in fact he was not performing the duties of a judge. The judgment of the Court of Appeal is null and void, and the appellant has been deprived of his right of appeal since his appeal has never been brought before or adjudicated upon by the Court of Criminal Appeal properly constituted. [Reference was made to *Butler v. The King* (1).]

On the merits—the facts are not in dispute—the defence was in essence that there was no intention to kill Abudu, and that the appellant did not know that the gun was loaded when he pointed it at the deceased. Whether the appellant thought that the Zabrama were thieves was the only difference between the defence and the prosecution stories. It is submitted that having regard to the direction of the judge that if the defence story was accepted the accused were guilty of manslaughter, and there being a verdict of manslaughter against the accused other than the appellant, it conclusively shows that the jury accepted the defence version as set up by the appellant. The Court of Appeal was in error in stating that as regards the appellant the jury had rejected his defence. The trial judge had failed to direct the jury on material matters thereby causing them to return a verdict of guilty of murder against the appellant. [Reference was made to *Woolmington v. Director of Public Prosecutions* (2).] In the circumstances of the case the appellant was denied the substance of a fair trial.

Dingle Foot followed. There was here provocation sufficient to reduce the crime to manslaughter : Archbold's Criminal Pleading, Evidence and Practice, 31st ed., pp. 872, 876. The provisions of the Criminal Code (Laws of the Gold Coast, 1936, vol. I., c. 9), ss. 232, 233, 234 and 235, exactly reproduce the English common law on the subject, and the following three questions ought to have been put to the jury : (a) Did the accused deliberately fire at the deceased ?—That was, of course, put to them ; (b) if so, was he at the time of firing deprived of the power of self-control by extreme provocation, namely, the stabbing ? ; and (c) if so, did such time elapse, or did such circumstances occur, that a person of ordinary character might

(1) [1939] A. C. 484.

(2) [1935] A. C. 462, 473.

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have recovered his self-control? Questions (b) and (c) were not put to the jury at all in any way. The judge put s. 63 to them. There was, therefore, no direction to the jury on the issue of provocation, and that is so grave an omission as to constitute a denial of justice. The principle governing both the provocation and the question of the time elapsing is set out in *Rex v. Hayward* (1). [Reference was also made to *Rex v. Thomas* (2).] In *Rex v. Hopper* (3) it was said: "whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself." That is applicable here, where the question of provocation was not raised in the courts below. [Reference was also made to *Ernest Prince* (4) and *Mancini v. Director of Public Prosecutions* (5).] In the present case it was the duty of the judge to have put the questions on provocation, or similar ones, to the jury, and not having done so, it means that one possible case was withdrawn from them.

Gahan for the respondent, was called on only on the question of provocation. In his summing-up the judge began by calling the attention of the jury to the relevant sections of the Criminal Code, which thus brought in the question of provocation. It is submitted that there is not here material on which the jury could find provocation which came within any of those sections, and the judge was perfectly right in his summing-up. It is not disputed that the appellant was stabbed, but there was here such an interval between the wounding and the shooting as would not justify a finding that there was loss of self-control because of that wound, and on the evidence no reasonable jury could find that it constituted provocation. The account of the accused does not show that he was in any way under any loss of self-control by reason of the wounding. Under s. 233 of the Criminal Code the burden is put on the person alleging provocation; the appellant has not discharged it; on the contrary, he throughout, according to the evidence, exercised most reasonable judgment and took effective steps to apprehend the alleged thieves. He has failed to bring himself within s. 233, sub-s. 1. On the facts of this case there is no evidence on which the jury could hold that there was a loss of self-control; further,

(1) (1833) 6 C. & P., 157, 159.

(2) (1837) 7 C. & P. 817.

(3) [1915] 2 K. B. 431, 435.

(4) (1941) 28 Cr. App. R. 60.

(5) [1942] A. C. 1.

the evidence negatives it. Finally, if there has been misdirection, or non-direction, it has not resulted in such a violation of justice as brings the case within the rules under which the Board will interfere in a criminal matter.

No reply was required.

Oct. 11. LORD PORTER announced that the appeal would be allowed, and the case remitted to the West African Court of Appeal with a direction that a verdict of manslaughter should be recorded in place of that of murder, and that the Court of Appeal should decide the proper sentence. Their Lordships' reasons for so directing would be delivered later.

Nov. 7. The reasons of their Lordships for allowing the appeal were delivered by LORD GODDARD, who stated the facts set out above and continued : The first submission on behalf of the appellant was that the court which heard the appeal was not properly constituted in that Mr. Quashie-Idun, who sat as an acting judge, had not been properly appointed in accordance with law. The West African Court of Appeal is constituted and has its powers conferred by various Orders in Council, now consolidated in the West African Court of Appeal Orders in Council, 1928-1935, being No. 2 of 1935. By s. 2 the expression "judge" includes any person for the time being performing the duties of such office. By s. 5 the judges of the Court of Appeal are the judges of the Supreme Courts of the Gold Coast and Nigeria and such other colonies to which the Order is applied, and by s. 9 there must be at least three judges to form a court. The Supreme Court of the Gold Coast is constituted by Ordinance No. 7 of 1935, which provides for the appointment of a Chief Justice and as many puisne judges as the Governor may from time to time appoint by letters patent. By s. 9 it is provided that in case of temporary illness or absence of any judge it shall be lawful for the Governor, in his discretion, to appoint a fit and proper person to fill the office of such judge until he shall resume the duties thereof. Now, it appears that the Chief Justice of the Gold Coast had appointed Monday, August 16, 1943, for the hearing of this appeal before a Court of Appeal consisting of himself, Fuad and Martindale JJ., but the last-named fell ill at the end of the previous week. No other judge was available to form a court for various reasons, and so to prevent the expense and inconvenience of a long adjournment, the case was

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put off till August 17, and in the meantime the Governor appointed Mr. Quashie-Idun, a district magistrate, to be an acting judge of the Supreme Court, the date of his appointment, as appears from the Gazette, being August 17. On that day, therefore, he became an acting judge of the Supreme Court of the Gold Coast.

In their Lordships' opinion he was a person for the time being performing the duties of such office, and it was unnecessary that he should first have acted as a judge in some other cause or proceeding before he was qualified to sit in the Court of Appeal. It was also contended that his appointment was bad because he was not expressly appointed to act in place of Martindale J.; but, in their Lordships' opinion, he was appointed in fact to act in place of that learned judge, who was prevented by illness from sitting on the appointed day. No doubt another of the puisne judges might have sat in the Court of Appeal had one been available, and the acting judge could then have sat in the Supreme Court. But the fact remains that the illness of Martindale J. caused a temporary vacancy, which, under s. 9, could be filled by the appointment of an acting judge, who during the period of his appointment had all the powers of an ordinary judge. In their Lordships' opinion the decision of the Board in *Butler v. The King* (1), on which reliance was placed, has no application to the present case. There the constitution of the Court of Criminal Appeal in Trinidad and Tobago came in question. The legislation establishing that court at that time was quite different from the Ordinances that have to be considered in this case, and in particular contained no such provision as is to be found in s. 2 of the West African Orders in Council, 2 of 1935.

The next point that was submitted for the appellant depends partly on the direction of the learned trial judge and partly on the verdict with regard to the prisoners, other than the appellant, who were found guilty by the jury of manslaughter only. As has already been said, the appellant's defence was that he pointed the gun at the dead man only for the purpose of frightening him, that he did not know it was loaded and that it was discharged accidentally. The learned trial judge directed the jury that only in the event of the appellant's evidence being accepted could a verdict of manslaughter and not murder be returned against him. Their Lordships think it is clear that his direction was that if the jury thought that his account was true

(1) [1939] A. C. 484.

the appellant was on his own showing guilty of manslaughter, because the pointing of the gun was in itself an unlawful act from which death resulted. The Court of Appeal, however, held that to be a misdirection, because, they said, pointing a gun which he did not know was loaded was not an unlawful act. On this point their Lordships are in agreement with the learned trial judge and disagree with the view taken by the Court of Appeal. Pointing a gun at a person is an assault unless done in protection of person or property. If it is pointed at a person without legal excuse, and there was none here, as the dead man was running away, it is an unlawful act. They need only to refer among the many cases on the subject to *Reg. v. Jones* (1), and *Reg. v. Weston* (2). But they agree with the Court of Appeal that by their verdict of murder the jury show that they rejected the appellant's evidence on this subject. Then it is said that as the other accused were only abettors, and were found to have abetted manslaughter only, it is impossible for the verdict of murder against the accused to stand. Their Lordships have not to consider the case of the other accused whose convictions have been quashed, but they are quite unable to agree with the argument that because the jury found those accused persons guilty only of manslaughter that can affect the verdict of murder against the principal offender. There was ample evidence of deliberate firing by the accused, and but for the point with which their Lordships will now proceed to deal they would not have been able to advise His Majesty to allow the appeal.

It was finally submitted on behalf of the appellant that, as there was evidence of matters which could amount in law to provocation sufficient to reduce the crime to manslaughter, this ought to have been submitted by the court to the jury, and the failure to do so on the part of the trial judge and the failure to consider it by the Court of Appeal was enough to justify the Board entertaining the appeal on the ground that there had been a failure of justice in this respect. It does not appear that any attempt was made in either of the courts below to argue that there was sufficient provocation to reduce the crime to manslaughter, and, indeed, as the defence relied on was one of accidental killing, it is not surprising that counsel for the prisoner did not attempt to set up what would appear to be inconsistent with that defence. But if on the whole of the evidence there arises a question whether or not the offence

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(1) (1874) 12 Cox C. C. 628.

(2) (1879) 14 Cox C. C. 346.

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might be manslaughter only, on the ground of provocation as well as on any other ground, the judge must put that question to the jury. This was distinctly laid down in *Rex v. Hopper* (1), a case in some respects resembling the present, more especially in that the line of defence adopted was that the killing was accidental and no attempt had been made at the trial to rely on provocation. This ruling was expressly approved by the House of Lords in *Mancini v. Director of Public Prosecutions* (2). The reason for the rule is that on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then, whether the defence have relied on it or not, the judge must bring it to the attention of the jury, because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder. Now in the present case there was undoubtedly a fracas in which at some stage the prisoner took part, and in which he was admittedly stabbed at a time before the shot was fired. The case was that the deceased man tried to get into his house after he had retired for the night and that he received the wound while trying to drive off or capture the intruder.

If that was true the stabbing would undoubtedly have amounted to provocation. The prosecution's case was, on the other hand, that the disturbance was caused by the villagers attacking the dead man and his fellow smugglers for the purpose of robbing them. As the case developed at the trial the truth of these two versions became immaterial, but on the issue of provocation it was all important. If a man is struck or stabbed while defending himself or his property, or while trying to apprehend a thief, there can be no question but that it amounts to provocation of the most serious character. The jury accordingly ought to have been told to consider whether the accused received his wound while acting in defence of his property or whether he got it in consequence of an attempt by him to steal from or injure a man who had done him no harm. That would have enabled them to say whether there was provocation in fact. Then another question would have arisen. The law relating to murder and manslaughter in the Gold

(1) [1915] 2 K. B. 431.

(2) [1942] A. C. 1.

Coast is contained in the Criminal Code, but in all material respects the Code reproduces the common law of England on the subject. Section 233 provides that intentional homicide shall be manslaughter only, if, among other matters of extenuation, it is proved on the accused's behalf that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in s. 234. Among the matters which may amount to extreme provocation is an unlawful assault of such a kind as to be likely to deprive a person being of ordinary character and in the circumstances in which he was of the power of self-control. Then s. 235 excludes the benefit of provocation where the accused was not in fact deprived of the power of self-control, and also where after the provocation such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self-control. This puts into statutory form what has for long been the law in this country. Now it may be said with a great deal of force that the prisoner's own evidence was that he had not lost self-control. So it might have been in *Hopper's* case (1). In both cases it was inevitable that this should be so, seeing that the line of defence was accident. But if the jury reject that defence it yet may be that in truth the shooting was due to a lack of self-control caused by provocation. Then again, it can be said that as there had been a chase, and the dead man had fled to a house and was killed while he was escaping from the house, and was shot from behind, there must have been time for an ordinary person to have regained control of his passion. In their Lordships' opinion, however, the question whether in the circumstances the provocation was such as to deprive an ordinary person of self-control, and whether sufficient time had elapsed to enable control to be regained, are questions for the jury. There may, no doubt, be cases where the facts were such that they could not be made the subject of extenuation; for instance, a blow or wounding one day, and a killing after a night had elapsed. Here, though there is no evidence how long after the stabbing the shooting took place, it seems clear it was all in the course of one continuing fracas. The tests have to be applied to the ordinary West African villager, and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable. In both *Rex v. Hayward* (2)

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(1) [1915] 2 K. B. 431.

(2) 6 C. & P. 157.

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and *Rex v. Thomas* (1), some time had elapsed between the provocation and the fatal act, but in both cases it was left to the jury to say whether in the circumstances the crime amounted to murder or only manslaughter. It follows, therefore, that the direction to the jury that the question of manslaughter could only arise if they accepted the accused's evidence that the shooting was accidental was wrong. It has resulted in a failure to take the opinion of the jury on a matter which, had they accepted the evidence, might have avoided a conviction for a capital crime. The principles on which this Board acts in criminal cases are well known and need no repetition, but when there has been an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the appeal. They would add that it must be seldom that they consider a matter which was not only not mentioned in the courts below, but was not included in the reasons given by the appellant in his case. It was not, indeed, raised till his junior counsel addressed the Board, but in view of the opinion of the House of Lords in *Mancini's* case (2) as to the duty of the court in such circumstances as they find existed here, they have thought it right to consider the matter, although not raised in the printed case. It is impossible to say what verdict would have been returned had the case been left to the jury with a proper direction. In these circumstances it is proper to take the course followed by the Court of Criminal Appeal in *Hopper's* case (3) and substitute for the jury's verdict one for the lesser offence. Their Lordships have accordingly humbly advised His Majesty that this appeal should be allowed and the verdict of guilty of murder and the sentence of death passed on the appellant should be set aside: that the case should be remitted to the West African Court of Appeal with directions to them to substitute for the verdict found by the jury a verdict of guilty of manslaughter, and to pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that offence.

Solicitors for appellant : *A. L. Bryden & Co.*

Solicitors for respondent : *Burchells.*

(1) 7 C. & P. 817.

(2) [1942] A. C. 1.

(3) [1915] 2 K. B. 431.

[PRIVY COUNCIL.]

KARUNAPEJJALAGE BILINDI AND } APPELLANTS ;
 OTHERS }

AND

WELLAWA ATTADASSI THERO RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND
 OF CEYLON.

J. C.*

1945

Nov. 19.

Ceylon—Appeal to Supreme Court—Stamp duty—Litigants with same interest—Represented by same proctor—One appeal only—Stamp Ordinance (Legislative Enactments, Revised Ed. 1938, c. 189)—Civil Procedure Code (of Ceylon) (Legislative Enactments, Revised Ed. 1938, c. 86), ss. 754, 755.

In an action for ejectment brought by the respondent against appellants Nos. 1-11 the appellants were all represented by the same proctor, who duly filed a proxy showing that he was acting for them. During the course of the proceedings appellant No. 12, who appeared to have an interest in the property, was added as a defendant. He abided by the answer of the other defendants and elected to be represented by the same proctor who appeared for them, and who thereupon filed another proxy for appellant No. 12. Judgment in the action was given for the respondent. On an appeal by the appellants the Supreme Court, upholding a preliminary objection by the respondent that as the proctor had filed two proxies, one for appellants Nos. 1-11 and the other for appellant No. 12, the petition of appeal should have been stamped as two petitions of appeal and not, as it was, as one, dismissed the appeal:—

Held, that there is nothing in ss. 754 and 755 of the Civil Procedure Code of Ceylon, or in the Stamp Ordinance, which prevents parties, all of whom have the same interest and who appear by the same proctor, from giving one notice of appeal ; there is only one appeal in such a case. Once appellant No. 12 was brought in, his position was the same as though he had originally been made a defendant, and as soon as he gave his proxy to the proctor and adopted the defence of the others he became a joint defendant with them for all purposes, and there was never more than one appeal.

James v. Karunaratna (1935) 37 Cey. N. L. R. 154, referred to. *Supper v. Muttiiah* (1939) 14 Cey. L. W. 70, overruled.

Case remitted to the Supreme Court with a direction to hear and determine the appeal.

It would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an

* *Present* : LORD THANKERTON, LORD GODDARD and SIR JOHN BEAUMONT.

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appeal on a ground which is, from a practical point of view, capable of easy remedy without injustice to anyone.

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APPEAL (No. 61 of 1944) from a judgment and decree of the Supreme Court of Ceylon (March 30, 1943) which dismissed on a preliminary objection an appeal from a judgment and decree of the District Court of Kurunegala (November 3, 1941).

In an action instituted by the respondent against the appellants for ejectment of the appellants from possession of certain lands in the District of Kurunegala on payment to them of the sum of Rs.975, or such sum as the court thought just and reasonable as compensation for improvements to certain portions of the lands, it was decreed that the respondent's liability to pay compensation for improvements was limited to certain portions of the lands, that the sum payable by him as compensation was Rs.7,806.56, that the appellants were liable to pay to the respondent damages at the rate of Rs.60 a month from October 10, 1938, until possession of the lands was restored to the respondent, and that they were liable to be ejected therefrom.

At the hearing of the appellants' appeal in the Supreme Court the preliminary objection was raised by the respondent that as the proctor who acted for appellants Nos. 1-11 and, also, for appellant No. 12, (a defendant whom the plaintiff had failed to make an original party to the action, but who was added, on the plaintiff's application, after the filing of the answer of the other defendants, and who abided by their answer) had filed two proxies (authorities to act) in connexion with the case (one for appellants Nos. 1-11 and the other for appellant No. 12), the petition of appeal should have been stamped as two petitions and not, as it was, as one.

The Supreme Court (Soertsz and Keuneman JJ.) upheld the objection and dismissed the appeal without a hearing, and the only question in this appeal was whether or not its decision was, in the circumstances of this case, correct and proper.

1945. Oct. 29. *Rewcastle K.C.* and *Handoo* for the appellants. There are two points; first, whether the Supreme Court were right in thinking that in law the petition of appeal was improperly stamped; and secondly, if they were, is it right that they should dismiss an appeal without considering its merits on a mere stamp objection without giving a *locus pœnitentiæ*. It was said to be improperly stamped because it was a petition

of appeal which must notionally be considered as being two petitions of appeal because the proctor who presented it on behalf of twelve clients of his had been retained by one joint power signed by eleven of them and one separate power signed by the twelfth. It was admittedly stamped rightly as one petition of appeal, but on the above reasoning it was held to be improperly stamped, and reliance was placed by the Supreme Court on two decisions—*James v. Karunaratna* (1) and *Supper v. Muttiah* (2)—neither of which, it is submitted, supports the point taken. In England it is a breach of etiquette for counsel to take a stamp objection; the objection is taken by the court and, on an undertaking to pay the necessary penalty being given, the document goes in. This petition of appeal was produced to the first court, who found it to be properly stamped, and the appeal went forward, so whether it is one or two petitions is a fine technical point. There is provision in the Stamp Ordinance whereby the omission can be corrected on payment of a penalty: Stamp Ordinance, ss. 39, 41. *James v. Karunaratna* (1) is not this case at all, because there were defendants represented by different proctors, so that there was some ground for thinking that the matter might be notionally regarded as two appeals. It is an authority which supports this case. At the time when this petition was presented to the proper court the proctor was representing all the twelve appellants, and on the authority of *James's* case (1) that was one petition of appeal. It is submitted that the judgment in *Supper's* case (2) is based on a complete misunderstanding of *James's* case (1). The petition of appeal was properly stamped because it was one appeal. If it was not one appeal, to dismiss it in the circumstances without giving any opportunity to rectify is contrary to natural justice and good practice and should not be allowed to stand. The proper course for the Supreme Court to have taken was to have directed the appellants to make up the deficiency in stamps and to hear the appeal on that direction being carried out, and not to reject the appeal outright.

Stephen Chapman for the respondent. The matter falls under three heads: (a) The general question; is it lawful in Ceylon to dismiss an appeal on the ground that the petition of appeal is improperly stamped? (b) The special question; is a petition improperly stamped if, when two proxies are filed,

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(1) (1935) 37 Cey. N. L. R. 154.

(2) (1939) 14 Cey. L. W. 70.

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the common petition bears only one stamp? (c) Whether the respondent was in any way precluded from taking this stamp point in the Supreme Court, and whether it is lawful for a party to take a stamp point. In England the last point has been based on rulings laid down by the General Council of the Bar—that it is unprofessional for counsel to take a stamp point. There is no such professional ruling laid down by the controlling body in Ceylon. In cases in Ceylon since 1867 this practice of dismissing the appeal if the petition of appeal is improperly stamped has been uniformly acted on. There are sixteen decisions of the Supreme Court, who have arrived at the practice by interpretation of the Stamp Ordinance and, in particular, the Civil Procedure Code. Broadly, they have laid particular stress on s. 35 of the Stamp Ordinance—the proviso to that section gives relief in relation to admission of evidence—and on s. 755 of the Civil Procedure Code. Where there is a long line of authority in the colony on a matter of practice and procedure this Board would hesitate to interfere and upset what has been the long-established practice. [Reference was made to *Cornalie v. Ukkua* (1), *Don Mathes Bandara v. Baban Appu* (2), *Salgado v. Peiris* (3), *Sinnetamby v. Tangamma* (4), *Thevanai v. Sinnappu* (5), *Supper v. Muttiah* (6), *James v. Karunaratna* (7) and *Abdul Wahid v. Mohammed Hassim* (8).] It is conceded that this is an extremely technical objection and that a very harsh result is reached. The Supreme Court say that it is not a petition which complies with the law, and that therefore they cannot entertain it, and in all the sixteen cases from 1867 they have consistently dismissed the appeal out of hand. As a matter of logic they are right, and it is difficult to draw the line unless by reference to the separate proxies given to the proctor.

No reply was required.

Nov. 19. The judgment of their Lordships was delivered by LORD GODDARD. This is an appeal from a decree of the Supreme Court of the Island of Ceylon dismissing an appeal by the appellants from a decree of the District Court of Kurunegala on a preliminary objection. The objection which the

(1) (1867) Rama-Nathan (1863-68), 278.

(2) (1892) 1 Matara Cas. 203.

(3) (1909) 12 Cey. N. L. R. 379.

(4) (1912) 1 Cey. Ct. of App.

Cas. 151.

(5) (1938) 39 Cey. N. L. R. 292.

(6) 14 Cey. L. W. 70.

(7) 37 Cey. N. L. R. 154.

(8) (1939) 41 Cey. N. L. R. 223.

Supreme Court upheld was that there was only one petition of appeal before the court whereas it was said that there were in truth two appeals, and as the petition bore a stamp sufficient to cover only one it was not properly stamped and the court was bound not to proceed on it but to dismiss the appeal. In support of their judgment the Supreme Court cited two cases, *James v. Karunaratna* (1) and *Supper v. Muttiah* (2), with both of which their Lordships will deal in this judgment.

The action out of which this appeal arose was one of ejectment, and was originally brought by the present respondent against the present appellants 1 to 11. They were all represented by the same proctor, who duly filed a proxy showing that he was acting for them. During the course of the proceedings, in consequence of the answer filed by them, it appeared that appellant No. 12 was interested in the property in question and was therefore a necessary party to the action, and accordingly an application was made to the court to add him as a defendant to the suit, and this was granted. He elected to be represented by the same proctor; Mr. Gomis, who appeared for the other defendants, and who was then directed to file his proxy and answer. This was done, and the court journal records that "the added defendant abides by the "answer of the defendant already filed." Judgment was given in the action for the plaintiff, and all the defendants decided to appeal; as has already been stated, one notice of appeal was given on their behalf by Mr. Gomis, who was still acting as proctor for them all. The Stamp Ordinance, c. 189 of the Legislative Enactments of Ceylon, requires that a petition of appeal should be stamped according to the value of the amount involved in the appeal. The Civil Procedure Code, which is c. 86 of the Enactments, provides by s. 754 that every appeal to the Supreme Court from any judgment, decree or order of any original court, shall be made in the form of a written petition, and that the petition shall be presented to the court of first instance for this purpose by the party appellant or his proctor within certain periods. By s. 755 all petitions of appeal shall be drawn and signed by some advocate or proctor, or else the same shall not be received, and this section contains a proviso, immaterial for present purposes, designed to help appellants in person. There is nothing in either of these sections, or in the Stamp Ordinance, which prevents parties, all of whom have the same interest and who appear by the

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(1) 37. Cey. N. L. R. 154.

(2) 14 Cey. L. W. 70.

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same proctor, from giving one notice of appeal ; there is only one appeal in such a case, not as many appeals as there are appellants. This was recognized by the court in the first of the two cases above-mentioned in which Koch J., referred to " the " accepted practice that two or more persons who sign a joint " proxy in favour of a proctor to represent them can be treated " for the purpose of pleadings and the appeal as constituting " one party." In their Lordships' opinion this is not a matter in which one need have recourse to some accepted practice ; the fact is that in such a case there is one appeal and one only. In that case, however, the defendants had severed in their defences and had employed two different proctors. Both those proctors had signed the notice of appeal which only bore one stamp. In such a case it may well be said that there were two appeals because the defendants were not acting jointly but severally. It was sought in the present appeal to say that this case applied because appellant No. 12 had been brought in as an added party. But once he was brought in his position was the same as though he had originally been made a defendant, and as he had given a proxy to the same proctor and had adopted the defence of the other defendants their Lordships are unable to see how it can be said that he was in any different position from any one of the other eleven. He was acting jointly with them, and there was never more than one appeal. The case of *Supper v. Mutiah* (1), already referred to, was in their Lordships' opinion wrongly decided and must be overruled. The facts were not the same as in *James's* case (2), because the appellants were not appearing by different proctors. It was argued in the present case that there was no joint proxy, apparently because the added defendant gave his proxy at a different time from the others. That is a fallacy ; as soon as he gave his proxy to the proctor who was acting for the others and threw in his lot with them by adopting their defence he became a joint defendant with them for all purposes. As this is enough to dispose of this appeal their Lordships do not propose to express any opinion whether it is open to the Supreme Court, once the petition has been accepted by the court of first instance, to take or give effect to an objection as to the sufficiency of the stamp, nor whether by the combined effect of ss. 756 and 839 of the Civil Procedure Code it may not be possible for a bona fide mistake as to the stamp required to be remedied and thus, perhaps, avoid a miscarriage of justice.

(1) 14 Cey. L. W. 70.

(2) 37 Cey. N. L. R. 154.

They say no more than that both points appear susceptible of considerable argument, and that it would be an unfortunate, and probably unintended, result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground which is, from a practical point of view, capable of easy remedy without injustice to anyone. Their Lordships will humbly advise His Majesty that this appeal should be allowed, with costs, and the case be remitted to the Supreme Court with a direction to hear and determine the appeal.

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Solicitors for appellants : *Wilson, Lambert & Collis.*

Solicitors for respondent : *Freeman & Cooke.*

[PRIVY COUNCIL.]

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MELVILLE APPELLANT ;

1945

AND

THE KING RESPONDENT.

Nov. 21 ;
Dec. 17.

ON APPEAL FROM THE COURT OF APPEAL OF TRINIDAD
AND TOBAGO.

*Trinidad and Tobago—Criminal law—Charge of murder of child—
Evidence—Unsworn testimony of young child—Admissibility—
Children Ordinance of Trinidad and Tobago (Rev. Ord. 1940, c. 4,
No. 21), s. 19 ; Schedule—Evidence Ordinance of Trinidad and
Tobago (Rev. Ord. 1940, c. 7, No. 9), s. 2—Applicability.*

Murder of a child is not one of the offences mentioned in the schedule to the Children Ordinance of Trinidad and Tobago, and therefore s. 19 of the Ordinance, which permits the reception of the unsworn evidence of young children in certain circumstances in the classes of offences specified in the schedule, did not operate to make admissible, on the trial of the appellant on a charge of murdering a boy of seven years of age, the unsworn evidence of two young children otherwise competent under s. 19 to give unsworn testimony.

The general words of the concluding sentence in the schedule to the Children Ordinance—"any other offence involving bodily injury to a child or young person"—are not to be read as

* *Present* : VISCOUNT SIMON, LORD THANKERTON and SIR JOHN BEAUMONT.

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admitting unsworn evidence in a class of offence already excluded by the effect of the first and more specific sentence of the schedule.

Section 2 of the Evidence Ordinance of Trinidad and Tobago, which provides that when any question arises touching, *inter alia*, the admissibility of any evidence, such question shall be decided according to the law of England for the time being in force, applies only in cases where there is no specific provision to the contrary in Trinidad law.

Decision of the Court of Criminal Appeal of Trinidad and Tobago reversed, and conviction quashed.

APPEAL (No. 41 of 1945), in forma pauperis by special leave, from a decision of the Court of Criminal Appeal of Trinidad and Tobago (February 6, 1943), on a case stated by Smith J. on December 29, 1942, for the opinion of the court on the question whether the unsworn evidence of two children, aged ten and eleven years, was rightly received and admitted at the trial of the appellant, who was indicted in the Supreme Court of Trinidad and Tobago and convicted by a jury for the murder of one Dolvin Gray, aged seven years. The case stated that if the said evidence was inadmissible the conviction must be quashed.

The following facts are taken from the judgment of the Judicial Committee. The appellant, an adult, was indicted before Smith J. in the Supreme Court of Trinidad and Tobago for the murder of a boy of between seven and eight years of age. He was convicted by the jury and sentenced to death, subject to the determination of a question of law raised by way of case stated by the trial judge for the opinion of the Court of Criminal Appeal of the Colony. The point of law was whether the unsworn evidence of two children, one of nine or ten years of age and the other of eleven years of age, was rightly received at the trial. Smith J., while of opinion that the two children possessed sufficient intelligence to justify the reception of the evidence, and sufficient understanding to realize the duty of speaking the truth, considered that they did not understand the nature of an oath, and they testified unsworn. He took the view that their unsworn testimony was admissible under the authority contained in s. 19 of the Children Ordinance of Trinidad and Tobago (Revised Ordinances, 1940; c. 4, No. 21).

The Court of Criminal Appeal in Trinidad (Vincent Brown Ag. C.J., Perez and Boland JJ.) decided that the evidence was rightly admitted under the authority conferred by the section, which authorized, in certain classes of offences therein referred to, the reception of unsworn evidence from a child

of tender years if the child was considered by the court to be possessed of sufficient intelligence and of an understanding of the duty of speaking the truth, even though the child did not understand the nature of an oath. The whole question to be decided was whether, when the offence charged was the murder of a child by an adult, that section applied.

Section 19 of the Children Ordinance enacted as follows :—

“ 19. Where, in any proceeding against any person for an offence under this Part of this Ordinance, or for any of the offences mentioned in the Schedule hereto, the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of that child may be received though not given upon oath, if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth ; . . . ”

There followed provisos requiring that there must be corroboration before a person was liable to be convicted under the testimony thus admitted, and providing for the punishment of an unsworn child witness who wilfully gave false evidence.

The Schedule ran as follows :—

“ Any offence under ss. 25, 49 or 55 of the Offences against the Person Ordinance, and any offence against a child or young person under ss. 6, 36 to 42 inclusive, 46 or 62 of that Ordinance, or under ss. 4 or 5 of the Summary Offences Ordinance.

“ Any other offence involving bodily injury to a child or young person.”

1945. Nov. 21. *Khambatta and Umrigar* for the appellant. Murder is not included in Part I. of the Children Ordinance, and therefore the material words of s. 19 are “ for any offences mentioned in the schedule hereto.” The offences mentioned specifically in the schedule include, under s. 6 of the Offences against the Person Ordinance, the crime of manslaughter, but exclude murder, which is contained in ss. 4 and 5 of the same Ordinance. The evidence of the two child witnesses was inadmissible under the provisions of the Children Ordinance and the Schedule thereto in that the legislature, by expressly including manslaughter in the schedule, by implication excluded murder from the category of “ bodily injury.”

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"Any other offence involving bodily injury to a child or "young person" in the last sentence in the schedule is to be related only to those sections that are set out in the schedule itself. The Court of Criminal Appeal were right in their view that in so far as there is express statutory provision in the Trinidad and Tobago Ordinance covering this particular point, the question of invoking s. 2 of the Evidence Ordinance would not be proper. [Reference was made to *Reg. v. Roberts* (1), *Lord Advocate v. Fraser* (2), and to Archbold's Criminal Pleading, Evidence and Practice, 31st ed., p. 934.] The construction of the Ordinance and schedule submitted for the appellant is the more reasonable one, the contrary one tending to a conflicting interpretation which the legislature could not have intended.

Gahan for the respondent. When the legislature of Trinidad and Tobago has deliberately enacted legislation similar to the English legislation, then, when the English legislation makes a declaration as to the meaning of the legislation enacted, and the local legislature has done nothing to dissociate itself from that meaning, the local legislation should be construed as adopting the meaning that is given to the English legislation. That is the position in this case, and the unsworn evidence of the two young children was admissible by virtue of s. 19 of, and the schedule to, the Children Ordinance. An examination of the history of s. 19 and of the comparable English legislation shows, as was held by the court below, that the words in the last sentence of the schedule, "any "other offence involving bodily injury to a child or young "person," includes the offence of murder. *Reg. v. Roberts* (1) was concerned with the Prevention of Cruelty to Children Act, 1894, but that Act was materially different from the present one in that the schedule was quite a short one. In any case, it was held in *Lord Advocate v. Fraser* (2), a case also under the Act of 1894, that the concluding words of the schedule, "any other offences involving bodily injury to "a child under sixteen years of age," included the case of culpable homicide. Seeking to give an independent meaning to s. 2 of the Evidence Ordinance, it effects that the law of England shall apply to questions of admissibility; it is submitted, however, that the respondent should succeed on construction, and irrespective of whether s. 2 of the Evidence Act is considered.

There was no reply.

(1) (1896) 18 Cox C. C. 530.

(2) (1901) 3 F. (J) 67.

Nov. 21. VISCOUNT SIMON announced that their Lordships would humbly advise His Majesty to allow the appeal. Their Lordships' reasons for so doing would be delivered later.

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Dec. 17. The reasons of their Lordships for allowing the appeal were delivered by VISCOUNT SIMON, who stated the facts set out above and continued : The offences included in the Part of the Ordinance referred to in s. 19 of the Children Ordinance do not include murder, and the question therefore comes down to this : Is murder, or at any rate murder of a child, an offence mentioned in the schedule to the Ordinance ? The first sentence of the schedule picks out from the Offences against the Person Ordinance (Revised Ordinances, 1940, c. 4, No. 9) certain offences, some of which in their nature cannot be committed against an adult, namely, s. 25 (exposing children under the age of two years) ; s. 49 (abduction of girl under fourteen years) ; and s. 55 (child stealing) ; and others all of which might in their nature be committed against persons of any age, but which are only included in the schedule when committed against a child or young person, namely, s. 6 (manslaughter) ; ss. 36-42 (defilement of women, etc.) ; s. 46 (indecent assault), and s. 62 (gross indecency). It is particularly to be noted that murder (s. 4 of the Offences against the Person Ordinance) is not included in the schedule, nor attempt to murder (s. 9). Similarly rape (s. 35) is not included, though lesser offences of a sexual character are, and sodomy and attempted sodomy are also left out. It is manifest, as far as this part of the schedule is concerned, that the policy of the legislature was to regard sworn evidence as the only evidence to be admitted in the most serious of the offences against the person. If, therefore, the first sentence of the schedule is to be understood as taking the whole list of offences in the Act under review and including some as capable of being tried with the help of unsworn children while the rest of such offences are excluded from the operation of s. 19, it is plain that the children's unsworn evidence in this case of murder was improperly admitted, and the trial judge expressly stated that if this evidence were inadmissible he would not have called on the defence and the conviction would have to be quashed.

The argument that the children's evidence is admissible, even in a case of murder, is advanced under two heads :—(a) It is first said that s. 2 of the Evidence Ordinance of Trinidad and

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Tobago (Revised Ordinances, 1940, c. 7, No. 9) justifies what was done. This section provides that "Whenever any question shall arise in any action, suit, information, or other proceeding whatsoever in or before any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence touching the admissibility or the sufficiency of any evidence, or the competency or obligation of any witness to give evidence, or the swearing of any witness, or the form of oath or of affirmation to be used by any witness, or the admissibility of any question put to any witness, or the admissibility or sufficiency of any document, writing, matter, or thing tendered in evidence, every such question shall be decided according to the law of England for the time being in force." The argument then is that s. 38 of the English Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), generalizes the admission of unsworn testimony by a child of tender years who is considered by the court to have the qualities of mind and morals before-mentioned, but subject to a proviso requiring corroboration, and that consequently the same latitude of admissibility of such evidence must now prevail in Trinidad. Their Lordships agree with the Court of Criminal Appeal in Trinidad that this argument is unsound. Section 2 of the Evidence Ordinance applies only in cases where there is no specific provision to the contrary in Trinidad law. It refers mainly to rules about hearsay, corroboration, and the like, and does not purport to make the provisions of an English statute a master code which automatically nullifies the express law enacted for Trinidad and Tobago. (b) The second, and more substantial, argument used by the respondent turns on the second section of the schedule to the Children Ordinance, which includes "any other offence involving bodily injury to a child or young person" among the offences in respect of which the unsworn evidence of a child may be admitted. It is contended that the charge of murder of a child falls within these words. Their Lordships are of opinion that the short and conclusive answer to this argument is that it would give to this general expression an effect which would overrule the specific exceptions involved in the first sentence of the schedule, of which the offence of murder is one. It may not be easy to give a confident interpretation to these final words, but there are offences not included in the Offences against the Person Ordinance which might involve personal injury to

a child or young person, e.g., the offence of driving a motor-car to the public danger in a case where the motor-car injured a child ; but whatever may be the difficulty of giving practical illustrations of the " other offences " referred to, it would not be a proper construction of the schedule to allow these general words to nullify the provision in the first sentence which in effect excludes such grave offences as murder, or rape, or sodomy.

The words of the schedule and, indeed, of the whole Children Ordinance are lifted bodily from the Children's Act of 1908 of this country, and a similar arrangement of specified sections in the Offences against the Person Act, 1861, followed by " any " other offences involving bodily injury to a child under the " age of sixteen years " appeared in the Prevention of Cruelty to Children Act, 1894 (57-58 Vict., c. 41). In connexion with s. 12 of that Act this concluding sentence in the Prevention of Cruelty to Children Act has been the subject of consideration in two reported cases, one from England and the other from Scotland, not, indeed, where the evidence of a child was involved, but where it was sought, by virtue of s. 12 and the schedule, to justify the calling of a wife as a competent though not compellable witness against her husband when accused of cruelty to a child. The English case (*R. v. Roberts* (1)) was a trial for causing grievous bodily harm to a child under sixteen years of age, tried at Liverpool Summer Assizes before Cave J. The Crown contended that the offence charged came within the concluding clause of the schedule, but Cave J. ruled that the " other offences " contemplated by these words are offences of which it is an essential part that the person injured is a child under sixteen years of age. The correctness of this decision has been doubted in the textbooks, and certainly could not be applied in a case like the present, where some of the offences specifically brought by the schedule within the operation of the section permitting unsworn evidence are offences which are not in their nature essentially perpetrated against children and not against adults. But in any case their Lordships do not consider that the right decision in the present appeal should be influenced by Cave J.'s ruling in the case referred to.

In Scotland, on the contrary, in a case (*Lord Advocate v. Fraser* (2)), where a husband was being tried for culpable homicide of a daughter, aged twelve, Lord Justice-General

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(1) (1896) 18 Cox C. C. 530.

(2) (1901) 3 F. (J) 67.

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Balfour ruled that the wife of the accused was an admissible witness, and thus in effect gave to the concluding sentences of the schedule an interpretation which cancelled out the omission of the section relating to the same offence in the Offences against the Person Act, 1861. The last named Act, however, did not apply to Scotland and the offence charged was an offence only at common law. The argument unsuccessfully advanced for the accused was that "any other offences" in the schedule must be "statutory offences of which the essence" was that the victim was under sixteen years of age" and that this construction, therefore, excluded the common law crime of culpable homicide. Their Lordships do not think that they can take this ruling as a guide in construing the Children Ordinance and applying it to this case.

Dealing with the matter as untrammelled by authority, their Lordships, as already stated, hold that the general words of the concluding sentence in the schedule to the Children Ordinance ought not to be read as admitting unsworn evidence in a class of offence already excluded by the effect of the first and more specific sentence.

Their Lordships have therefore humbly advised His Majesty that the appeal must be allowed and the conviction quashed.

Solicitors for appellant : *Bassadone & Brewer.*

Solicitors for respondent : *Burchells.*

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Dec. 19.

MARIKAR APPELLANT ;
 AND
 AUSTIN DE MEL LIMITED RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Principal and agent—Broker—Contract—Rubber coupons—Custom—Claim in reconvention—Maintainability.

The appellant having brought a suit against the respondent company, brokers, for a sum as damages sustained by him on

* *Present* : VISCOUNT SIMON, LORD THANKERTON and SIR JOHN BEAUMONT.

certain contracts relating to the buying and selling of rubber coupons, issued by the Rubber Controller in Ceylon, the respondent company admitted liability for the sum claimed, but having on the appellant's instructions, and during the period to which the appellant's claim related, purchased on the appellant's account, through an undisclosed principal, 1,000,000 lbs. rubber coupons, it claimed in the appellant's suit, by way of reconvention or counterclaim, a sum as damages in respect of the appellant's repudiation of that contract. Under the agreed usage of the Colombo rubber coupon market, subject to which the contract was made, the broker was liable to deliver to the buyer the coupons sold whether or not he had received them from the seller, and the buyer was liable to pay the contract price direct to the broker if delivery was accepted :—

Held, that in the circumstances the respondent company was entitled in law to maintain its claim in reconvention. In making payment to the seller and delivery to the buyer the broker was required to act as a principal, and those obligations conferred corresponding rights, and accordingly, the appellant having wrongfully refused to accept delivery, the respondent broker was the party to recover damages for the breach of contract—it was suing in its own name under a special power conferred on it by its contract of employment.

Decree of the Supreme Court of Ceylon affirmed.

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APPEAL (No. 8 of 1945) from a judgment and decree of the Supreme Court of Ceylon (January 15, 1943), setting aside a judgment and decree of the District Court of Colombo (January 16, 1942).

The following facts are taken from the judgment of the Judicial Committee. The appellant instituted the action out of which this appeal arose on October 16, 1940, in the District Court of Colombo against the respondent for the recovery of the sum of Rs.56,185/18, being damages sustained by him between April 1, 1940, and May 27, 1940, on certain contracts relating to coupons issued by the Rubber Controller under a Rubber Restriction Scheme in force in Ceylon during the relevant periods under the Rubber Control Ordinance. The export of rubber without such coupons was prohibited.

The respondent, which was a company doing the business of brokers in Colombo, admitted its liability to the appellant in respect of the said sum, but alleged that on May 15, 1940, the appellant had instructed it to purchase one million coupons each covering the export of a single pound of rubber, that on the same date it had arranged for the purchase of the said quantity of coupons on the appellant's account with an undisclosed principal, and that the appellant had subsequently

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repudiated the said contract without lawful cause. The respondent claimed that the appellant was liable to pay to it damages in respect of the said contract, or to indemnify it against liabilities incurred as his brokers, and, giving credit in certain sums admittedly due by it to the appellant, claimed in reconvention a sum of Rs.107,055/81.

At the trial the market price at which the coupons were sold on various dates was admitted, and the figures were not in dispute. It was agreed that if the respondent succeeded in establishing its claim in reconvention judgment would be entered for it for Rs.107,055/81, and that if the respondent's claim in reconvention was rejected judgment would be entered for the appellant for Rs.56,185/18. The making of the contract of May 15, 1940, on which the respondent's claim in reconvention was founded, was denied by the appellant. At the trial the learned District Judge disbelieved the evidence of the appellant and held that the contract was made as alleged by the respondent. That finding was upheld by the Supreme Court and was not challenged before the Board.

The appellant also denied receiving the bought note embodying the contract, and did not produce it, but its terms were proved from an entry in the respondent's contract book. That note was in the following terms :—

“ Austin de Mel Ltd. Colombo, 15th May, 1940.

“ RUBBER COUPON CONTRACT NO. R.6661.

“ E. L. Ebrahim Lebbe Marikar, Esq.

“ Dear Sir,

“ We have this day bought by your order and for your account from our principals (1,000,000) lbs. of Rubber Coupons at 30½ cts., per coupon lb. Delivery 2nd issue 1940. Payment on Delivery.

“ Yours faithfully,

“ for Austin de Mel Ltd.,

“ (Sd.) Austin C. de Mel,

“ Brokers.

“ Sold according to Chamber of Commerce

“ Conditions of Sales.

“ This Contract shall be subjected to any alteration in the Rubber Control Ordinance or conditions that may be imposed under that Ordinance, or by further legislation affecting transactions in Rubber Coupons.”

The principal question discussed in the judgments of the

lower courts, and the only question which really arose on this appeal, was whether the respondent company was entitled in law to maintain its claim in reconvention. To determine that question it was necessary to notice the course of business and the custom or usage as regards contracts relating to rubber coupons in force in the Colombo market when the contract in suit was made. At the outset of the trial the parties, by their counsel, agreed, as noted in the judgment of the learned District Judge, that that custom or usage was as follows :—

“ The broker’s bought note, or sold note (as the case may be) never discloses the name of the other party to the contract.

“ The broker is, as far as the seller is concerned, liable to accept delivery of all coupons tendered, and to pay the full contract price of the amount tendered by the seller whether the buyer accepts delivery or not.

“ The seller may, instead of tendering the coupons, instruct the broker to negotiate a fresh contract for the purchase of the same quantity of coupons as that covered by the original contract. In such a case the seller is entitled to receive from, or liable to pay to, the broker direct the difference between the original contract price and the new contract price on a stated account.

“ As far as the buyer is concerned, the broker is liable to tender and deliver the coupons irrespective of whether the seller has tendered or not. If the buyer accepts delivery he is liable to pay the contract price direct to the broker. The buyer may, instead of accepting delivery of the coupons, direct the broker to sell the tendered coupons on his behalf at the market price of the day of tender. In that event the difference between the original contract price and the market price is received from or paid to the broker direct.

“ The buyer and seller have no dealings with each other direct in regard to performance of the contract. Each party is entitled to look to the broker for performance.”

The District Judge entered judgment for the appellant for Rs.56,185/18, and dismissed the respondent’s claim in reconvention. On appeal, the Supreme Court (Soertsz and Hearne JJ.) held that the present respondent was entitled to succeed on the claim in reconvention, and they set aside the decree of the District Judge and entered judgment for the respondent for Rs.107,055/81.

1945. Nov. 19, 20. *Sellers K.C.* and *A. J. Hodgson* for the appellant. The appellant’s claim for the Rs.56,185/18 was not

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in dispute except in so far as it would be taken into consideration on the respondent's counterclaim, on which the action was really fought. The finding that the 1,000,000 lbs. contract was entered into is not now disputed. The law in Ceylon about wagering contracts does not appear to differ materially from our own, although its origin, Roman-Dutch, may be different, and it is first submitted that on a proper view of the evidence and admissions of parties the contract is a wagering contract: *Tarrant v. Marikar* (1). Secondly, the broker here is a surety for his principal, whether he be a buyer or a seller, and can in consequence be sued, but there is still privity of contract between the principal and the undisclosed principal—the two principals—and they can sue on the contract as well, but that would not enable the broker to sue on a contract as a principal. The liabilities remain between the ultimate contractors, but each party has the intermediary broker as a surety. The broker has no rights in law of suit against either party on the contract; he may have some rights to indemnity in certain circumstances. Viewed in that way, until the broker has paid and is out of pocket—and here he has not established that he has suffered any loss—he cannot get any remedy from his principal by action for indemnity; he cannot sue on the contract, and he has no other legal remedy. The Supreme Court held that there is a right in reconvention to sue, and that the proposition is covered by the authorities which are set out in their judgment—*Fleet v. Murton* (2) and *Lacey v. Hill* (3). *Fleet v. Murton* (2) makes a broker a surety for the payment to his respective principal, but it is submitted that it does not go further than that. *Lacey v. Hill* (3) has been considered in *In re Richardson, St. Thomas's Hospital (Governors), Ex parte* (4), and it is submitted that it is not an acceptable authority. *In re Richardson* (4) sets out the true position in regard to an agent recovering an indemnity. Here it is either indemnity or nothing.

With regard to the custom which was agreed—that if the buyer accepts delivery the broker would be able under the custom to sue for the price of the goods sold and delivered—the District Judge was right when he said “I hold that there “is nothing in any local usage by which the defendant “company, who acted merely as agents for an undisclosed

(1) (1934) 36 C. N. L. R. 145.

(3) (1874) L. R. 18 Eq. 182.

(2) (1871–2) L. R. 7 Q. B. 126.

(4) [1911] 2 K. B. 705.

“principal, can claim to act as a principal and sue on the “contract of the undisclosed principal.” Under this custom the broker does not become in any sense a buyer and a seller of the property as a principal. It does not affect the main transaction which lies between the respective principals, between whom privity of contract obtains. [Reference was made to *Bramwell v. Spiller* (1).] This custom, unless it is very clear and explicit, ought not to be so construed as to give a totally different complexion to what is really a contract of agency and make it into a contract of a different kind—one for the sale and delivery of goods.

W. L. McNair K.C. and *Mocatta* for the respondent company. By the usage which was applicable to this transaction the broker firm can sue their principal, the appellant, not on the main contract itself, but on a term of their contract of employment. It is as if in the contract of employment of the respondent company by the appellant there was written out in terms the usage or custom as agreed between the parties. One would then find as part of the written contract that the broker is liable to tender and deliver the coupons irrespective of whether the principal seller has tendered or no; that is part of the terms on which the broker is employed. It would also be found then to be part of the terms of the broker's employment that if the appellant accepts delivery he is liable to pay the contract price direct to the broker. That being so, that means, it is submitted that the broker can sue to enforce that liability. It is a statement of liability arising between two parties—the principal and the broker. If that is the right view then all the difficulties that have been advanced on behalf of the appellant disappear.

There was no reply.

Dec. 19. The judgment of their Lordships was delivered by SIR JOHN BEAUMONT, who stated the facts set out above and continued: It was admitted by the respondent that the seller of the 1,000,000 lbs. rubber coupons was Kathleen de Mel, wife of Austin de Mel, the managing director and principal shareholder in the respondent company. The appellant contended that Kathleen de Mel was a mere alias for the respondent company which had really sold its own coupons to the appellant. The learned trial judge held that there was no conflict of interest between Kathleen de Mel and the

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respondent company, and that the respondent company dealt with Mrs. de Mel in the ordinary course of business, and this finding was accepted by the appellate court. Their Lordships accept this concurrent finding of fact. A further contention raised by the appellant, which can be disposed of at the outset, was that the contract of May 15, 1940, was a wagering contract and unenforceable. This claim was rejected by both the lower courts, and so far as the question is one of fact, their Lordships accept the findings of the lower courts. So far as the matter involves any question of law, it is clear that if the appellant was entitled to delivery of the coupons purchased the contract was not a wagering one. There is nothing in the terms of the contract to preclude the appellant from demanding delivery, and he was, in fact, by the letter of the respondent's proctor dated June 11, 1940, offered formal tender of the coupons sold, which offer he declined. Their Lordships therefore agree with the lower courts in holding that the contract was not a wagering one.

The District Judge having found all the facts against the appellant nevertheless decreed his suit and dismissed the respondent's claim in reconvention on a point of law. He held that the respondent having entered into the contract in suit as agent for Kathleen de Mel could not sue on it; that to allow an agent for an undisclosed principal to sue in his own name on the principal's contract would be to disregard a well-established principle in the law of agency; and that the market usage subject to which the contract was made could not alter the intrinsic nature of the contract. The Supreme Court in appeal took a different view of the law, and gave judgment for the respondent on its claim in reconvention. Their Lordships entertain no doubt that the view of the Supreme Court was right. The fallacy underlying the judgment of the learned District Judge lies in the assumption that the respondent was suing on a contract made by his principal. This was not the case; he was suing in his own name under a special power conferred on him by his contract of employment. Under the agreed usage of the market the broker was liable to deliver to the buyer the coupons sold whether or not he had received them from the seller, and the buyer was liable to pay the contract price direct to the broker if delivery was accepted. In the event of the buyer accepting delivery and refusing payment it is plain that the broker must have a right to enforce the liability. It follows logically from

this position that if the buyer wrongfully refuses to accept delivery (as in this case he did) the broker is the person to recover damages for the breach of contract. The fact is that the contract in this case imposed on the broker obligations far more onerous than would normally rest on an agent. The broker in making payment to the seller and delivery to the buyer was required to act as a principal, and these obligations conferred corresponding rights. There is no objection in law to parties entering into a contract of this nature, and, as the Supreme Court pointed out, the respondent is not to be deprived of his rights under his particular contract because they would not have arisen under a normal contract of agency.

A further point taken by Mr. Sellers for the appellant was that on the true view of the contract of May 15, 1940, the broker became a surety for the due performance of the contract by the seller and the buyer, and that he could not claim indemnity from the buyer unless he proved that he had suffered loss, and that he had not done this since he had tendered no evidence of any payment made to the seller. The answer to this argument is that the contract is not one involving suretyship; there is nothing in the contract to suggest that the buyer must first claim delivery of the coupons from the seller before having recourse to the broker. On the contrary, the last paragraph of the agreed market usage expressly provides that the buyer and seller have no dealings with each other direct in regard to the performance of the contract, and that each party is entitled to look to the broker for performance. This negatives the theory that the broker was only a surety.

For these reasons, which are substantially those on which the Supreme Court acted, their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondent.

Solicitors for appellant : *Stephenson, Harwood & Tatham.*

Solicitors for respondent : *William A. Crump & Son.*

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NARAYANAN CHETTIAR AND OTHERS . APPELLANTS ;

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AND

KALIAPPA CHETTIAR AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Appeal to Privy Council—Ceylon—Partition of estate—Objections—Basis of Commissioner's valuation not attacked—No question of principle involved—Not a proper subject for appeal.

Where in an action for the partition of an estate under the Ceylon Partition Ordinance objections taken by the appellants to the report of the Commissioner, to whom the matter had been remitted pursuant to an interlocutory decree to carry out the actual partition and suggest the division, had been dismissed by the District Judge, whose conclusion was affirmed by the Supreme Court on appeal, and there had been no attack on the basis of the Commissioner's valuation which raised any question of principle, the matter was not a proper subject of appeal for their Lordships of the Board to consider, and the appeal from the judgment of the Supreme Court was accordingly dismissed.

There was no ground for distinction between this case and that of an ordinary dissolution of partnership and distribution of assets and accounting, and the appeal fell directly within the decision in *N. R. Kapur v. Murli Dhar Kapur* (1944) L. R. 71 I. A. 149.

APPEAL (No. 73 of 1944) from a judgment of the Supreme Court of Ceylon (July 15, 1943), affirming a decree of the District Court of Kandy (November 20, 1941), whereby certain lands jointly held in the Gampola district were partitioned between the appellants and the respondents and certain sums were ordered to be paid in equalization of shares.

The interests of the parties in the lands jointly held, a tea and rubber plantation, were : first respondent (plaintiff), one-third ; first, second and third appellants, one-ninth each ; remaining parties, one-third jointly. The joint lands had on them two factories, one large and one small, the larger one being capable of dealing with the whole tea output of the estate. By his plaint the first respondent claimed partition, and by an interlocutory decree, dated February 21, 1940, the court decreed a partition in the shares as set out above, and appointed a commissioner to partition and allot to the parties

* *Present* : LORD THANKERTON, LORD GODDARD and SIR JOHN BEAUMONT.

in the said shares. He divided the estate into three lots of specified valuations and allotted to the first three appellants jointly lot 1, to the first respondent lot 2, and to the other parties jointly lot 3. Lot 3 included the larger factory, valued at Rs.44,700.00. The appellants and the second, third and fourth respondents were desirous of working their shares of the estate as a single plantation, for which the larger factory was suitable. They therefore, and for other reasons, lodged objections to the apportionment and allotment.

The District Judge, who described the larger factory as being in existing conditions a "dead investment," confirmed the award and ordered compensation to be paid according to the valuation of the Commissioner. On appeal the Supreme Court (Howard C.J. and Keuneman J.) said "we are unable" to disturb the findings of the District Judge who has embraced "the report of the commissioner," and they dismissed the appeal.

J. C.

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1945. Dec. 11. *Wilfrid Barton K.C.* and *Gahan* for the appellants.

Rewcastle K.C. and *Handoo* for the first respondent.

Dec. 11. The judgment of their Lordships was delivered by LORD THANKERTON. The present appeal raises a question with regard to the division of an estate in Ceylon which carried both tea and rubber on it and which had been held jointly by a certain number of people. The action is one for partition under the Ceylon Partition Ordinance and proceeded according to the ordinary procedure, beginning with an interlocutory decree fixing the shares of the parties and remitting the matter to a commissioner to carry out the actual partition and suggest the division. A motion by the present appellants that a sale should be ordered of the whole property was rejected and the partition was ordered in its place. A report was made by the commissioner, objections were taken to it by the present appellants, and these were disposed of by the learned District Judge. They were all disposed of and the only alteration he made in the commissioner's report was a modification, about which there is no dispute, to provide an adequate water supply for one of the lots. The matter was then appealed to the Supreme Court, who affirmed the conclusion of the District Judge without any difficulty.

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It is now sought to bring this matter before this Board by way of the present appeal. It appears to their Lordships that this appeal falls directly within the decision which was given in *N. R. Kapur v. Murli Dhar Kapur* (1), for these reasons : The basis of the commissioner's valuation has never been attacked in this case, but the passage founded on by Mr. Barton in the judgment of the District Judge contains the phrase "dead investment." In their Lordships' opinion that passage shows clearly that the learned District Judge accepted the Rs.44,700.00 as a valuation on the basis of the factory being for the time a dead investment owing to the tea restrictions. Their Lordships in any case, in the absence of an attack on the basis of the valuation, which would raise a question of principle, are bound to assume that the valuer, valuing at the time when the tea restrictions were on, took those into account and took their effect into account in fixing his valuation.

The only other question Mr. Barton raised was with regard to the more convenient allocation, as it may be called, that it was sought to obtain before the District Judge, because it was said that the lots which the parties would have wished to have allotted would be more valuable. That is an ordinary matter which arises in every distribution of assets among partners. It appears to their Lordships that there is no ground for distinction between the present case and a case of ordinary dissolution of partnership, and distribution of assets and accounting, as was the case in *Kapur's* case (1).

Accordingly, their Lordships are bound to come to the conclusion that the subject of the present appeal is not a proper subject for their Lordships' Board to consider, and they will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs.

Solicitors for appellants : *Peake & Co.*

Solicitors for first respondent : *Lee & Pembertons.*

(1) (1944) L. R. 71 I. A. 149.

[HOUSE OF LORDS.]

H. L. (E.)*

CANADIAN EAGLE OIL COMPANY
LIMITED APPELLANTS ;

AND

THE KING RESPONDENT.

SELECTION TRUST LIMITED . . . APPELLANTS ;

AND

DEVITT (INSPECTOR OF TAXES) . . RESPONDENT.

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May 29 ;
June 1, 4, 5,
6, 7, 11, 13,
14 ;
July 30.

Revenue—Income tax—Double taxation—Foreign company holding shares in British companies—Receipt of dividends from British companies after deduction of tax—Payment of dividend to shareholder of foreign company in United Kingdom—Claim for relief—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), sch. D., Misc. Rules, r. 7, General Rules, r. 20.

By r. 7 of the Miscellaneous Rules of sch. D. to the Income Tax Act, 1918, a charge is imposed on dividends payable in respect of the shares of any foreign company, without any reference to the sources of that company's income and r. 20 of the General Rules applicable to all schedules is not applicable to the case of such a company ; accordingly the charge is not to be abated in proportion as the income of the company is itself chargeable, or not chargeable, to British income tax. There is no right to such relief whether the claim be made by a foreign company paying dividends through an agent to shareholders in the United Kingdom or by a shareholder in the United Kingdom who has received dividends direct from the foreign company and who has therefore been directly assessed in respect of such dividends as income arising from foreign securities under Case V. of sch. D.

Gilbertson v. Fergusson (1881) 7 Q. B. D. 562 ; 1 Tax. Cas. 501 overruled.

Decisions of the Court of Appeal (sub nom. *In re Canadian Eagle Oil Co., Ltd.'s Petition of Right* [1944] W. N. 167 ; 171 L. T. 42 ; and *Selection Trust Ltd. v. Devitt* [1944] W. N. 168 ; 171 L. T. 47) affirmed.

APPEALS from the Court of Appeal, heard consecutively.

CANADIAN EAGLE OIL COMPANY LIMITED *v.* THE
KING.

The facts, stated by VISCOUNT SIMON and LORD SIMONDS, were as follows : The appellant company, Canadian Eagle Oil

* *Present* : VISCOUNT SIMON, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD SIMONDS.

H. L. (E.) Co., Ltd., was a corporate body, incorporated in 1928 in the Dominion of Canada under the laws of that Dominion. It had never been a person residing within the United Kingdom within the meaning of the Income Tax Acts, and it did not carry on trade there. Many of its shareholders, however, were resident there. Its income for the years material to this appeal consisted either wholly or partly of income which bore United Kingdom income tax either by deduction or by direct assessment. Such income fell into three classes: (a) dividends on shares owned by the appellant company in British companies resident in the United Kingdom which were received under deduction of tax; (b) interest on loans made by the appellant company to British companies resident in the United Kingdom which was also received under deduction of tax; and (c) interest on money deposited with banks in England by the appellant company's agents on its behalf, which was charged with tax by direct assessment on the appellant company's agents under the provisions of Case III. of sch. D. to the Income Tax Act, 1918. The authorized and issued capital stock of the appellant company at all material times consisted of (a) cumulative first preference shares, which were entitled only to a dividend at a fixed and pre-determined rate; (b) participating preference shares which were entitled to a dividend at a fixed and predetermined rate but were also entitled in certain circumstances to a further dividend at a rate determined upon each particular occasion of distribution; and (c) ordinary shares entitled to dividends at a rate so to be determined. Dividends had from time to time been paid by the appellant company on one or more of the three classes of shares through the Midland Bank, Ltd. (hereinafter called "the bank"), and in accordance with r. 7 of the Miscellaneous Rules applicable to sch. D were assessed to tax by the Special Commissioners in the hands of the bank who deducted it at the appropriate rate from so much of the dividends as were paid to persons resident in the United Kingdom, after making any due adjustment in respect of Dominion tax relief allowance, and duly paid over to the Commissioners of Income Tax the amount of tax so deducted. In the year 1929 (for which year the appellant company paid dividends only on its cumulative first preference shares) repayment was made to the appellant company of a substantial sum in respect of the tax which had been paid by the bank under r. 7, by deduction from dividends paid to shareholders resident in the United

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Kingdom, this sum being ascertained by means of an agreed formula, so that so much of the amount of tax deducted against shareholders of all three classes as was found by means of a proportionate sum to be attributable to that part of the appellant company's income as was subject to United Kingdom income tax was repaid to the appellant company. In the year 1930 a similar course was followed. In the year 1931 the appellant company paid dividends on all three classes of its shares and similar relief was given to the appellant company in respect of the tax paid on all such dividends. In the year 1932 a change was made, for in that year the Revenue authorities declined to grant relief in respect of the tax paid on the dividends on the two classes of preference shares, the ground of their refusal being that they were advised that no relief was allowable in the case of dividends paid at a fixed rate, so that the repayment was confined to a proportion of the tax deducted against the holders of ordinary shares alone. The Revenue authorities maintained their position and the appellant company did not contest it. In the years 1933, 1935 and 1936 the appellant company paid no dividends at all. In the year 1934 it paid dividends only on its preference shares. In the years ended April 5, 1937, 1938 and 1939, the appellant company paid dividends on all three classes of its shares and in these years relief was claimed and allowed in respect of the dividends on the ordinary shares only. For the year ended April 5, 1940, a new attitude was adopted by the Revenue authorities. In that year the appellant company again paid dividends on all three classes of shares, but, on claiming relief in respect of tax paid on the ordinary share dividend, was told by the Revenue authorities that it could only be granted in respect of so much of the tax as was attributable to that part of its income arising in the United Kingdom which had been the subject of direct assessment, i.e., the interest paid by banks in England with whom money had been deposited, the two categories of income on which tax was deducted against the appellant company at source being left out of account. The comparatively small sum thus tendered in repayment was refused by the appellant company which thereupon presented a petition of right praying for relief by way of repayment of tax in respect of dividends on both classes of preference shares for the years ending April 5, 1932, 1934, 1937, 1938, 1939 and 1940, as well as in respect of dividends on the ordinary shares for the year ending April 5, 1940. It was

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H. L. (E.) claimed that the amount repayable should be calculated in relation to all those categories of the appellant company's income that were charged in the United Kingdom. The Crown, though at first willing to concede the much diminished relief previously referred to, finally objected that no relief of any kind should be given. Accordingly the Attorney-General demurred to the petition. The demurrer was upheld by Macnaghten J. and by the Court of Appeal (Scott, Goddard and du Parc L.JJ.). The appellant company appealed to the House of Lords, contending (1.) that "there has been a double charge of United Kingdom income tax upon a portion of its income, in that, in addition to the tax suffered, either by deduction or direct assessment, upon the whole of the appellant's income which arose in the United Kingdom, there has also been paid to the said Commissioners, through the bank, further sums by way of tax upon so much of that income as was distributed to British resident shareholders in dividends," and (2.) "that relief from such double charge must be given, and that, in the circumstances of the present case, it is the appellant itself who is entitled to such relief."

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The facts, stated by VISCOUNT SIMON, were as follows: The appellant, the Selection Trust, Ltd., was a British company resident in the United Kingdom and carrying on there the business of dealing in and holding investments. As such, it held (*inter alia*) shares in the common stock of a company incorporated in the United States and described in the special case as the "American Metal Co., Ltd." (*sic*). This American company in its turn held shares in five British companies trading in the United Kingdom; and the American company received dividends on those shares after deduction by the respective British companies of the United Kingdom income tax appropriate thereto, as is authorized by r. 20 of the General Rules. These dividends formed part of the profits of the American company, out of which they paid dividends on their stock; such dividends were paid to the appellant company on the shares which it held in the American company, without any deduction being made on account of United Kingdom tax. The dividends thus paid to the appellant company were "income arising from possessions out of the United Kingdom,"

and as such might have been charged under Case V. of sch. D but the Commissioners of Inland Revenue, exercising the option vested in them, included these dividends in the charge under Case I. in respect of the trade carried on in the United Kingdom by the appellant company; and included the whole of those dividends in computing the amount of the charge. It did not appear whether the American company had any paying agent in the United Kingdom; but at any rate there had been no assessment on any such agent, and r. 7 of the Miscellaneous Rules of sch. D had no application in this appeal.

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The appellant company appealed against the assessment to income tax on its trading profits on the ground that there should be excluded, in computing those profits, a proportion of the dividends received by it attributable to that part of the American company's profits for each year which consisted of dividends received by the American company from its British investments. The Special Commissioners dismissed the appeal and affirmed the assessment. At the request of the appellant company they stated a case for the opinion of the High Court setting out the figures. Their decision was affirmed by Macnaghten J. and by the Court of Appeal (Scott, Goddard and du Parc L.JJ.). The appellant company appealed to the House of Lords.

Tucker K.C. and *F. Heyworth Talbot* for the Canadian Eagle Oil Co., Ltd. This case is governed by *Gilbertson v. Fergusson* (1). The argument for the respondent in that case (2) is the same as that for the appellant in this case. Even if the reasoning in it cannot now be supported, in view of the opinions expressed in *Barnes v. Hely Hutchinson* (3) and *Cull v. Inland Revenue Commissioners* (4), nevertheless the actual decision can be supported on other grounds and these are equally applicable to the present case. One of the principles on which it was based was that when a company, under whatever law it is incorporated and whether or not it is resident in the United Kingdom, distributes a dividend, that is really only the dividing among the corporators of the distributable profits of the corporation. For these purposes

(1) (1879) 5 Ex. D. 57; (1881) 7 Q. B. D. 562; 1 Tax Cas. 501. (3) [1940] A. C. 81, 89; 22 Tax Cas. 655, 672.

(2) 1 Tax Cas. 501, 515.

(4) [1940] A. C. 51, 56; 22 Tax Cas. 603, 636.

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the Income Tax Acts recognize a measure of identity between a United Kingdom company and its shareholders: see *Bradbury v. English Sewing Cotton Co.* (1) and this is applicable by analogy to the case of a foreign company. Another principle was that if the profits so divided had already borne income tax and were again charged to such tax there would be double taxation of what was, in effect, the same income; tax can only be charged once on the same income of the same person. Such double taxation is contrary to the principles of the Income Tax Acts; if it has in fact occurred relief can be claimed. *Gilbertson v. Fergusson* (2) should be followed in so far as it recognized and applied these principles. Since the decision in that case relief from double taxation has always been granted in practice. Parliament in passing the annual Finance Acts and the Income Tax Act, 1918, must be taken to have known of the decision in that case and also that in *Queensland National Bank v. The King* (3), as well as the practice based on them. The legislation passed did not alter the principles on which they were based and after so great a lapse of time this House should hesitate to reject those principles and the method of applying them. See *The Anna* (4); *Webb v. Outtrim* (5) and *Barras v. Aberdeen Steam Trawling & Fishing Co., Ltd.* (6). [They also referred to *Robinson Brothers (Brewers), Ltd. v. Durham County Assessment Committee* (7).] Accordingly, current income tax legislation should be construed as affording such relief. The conclusion which emerges is that if the income of a foreign company, out of which dividends are paid to shareholders resident in the United Kingdom, can be shown on analysis of its origins to have borne United Kingdom income tax as to some portion thereof, then if the shareholders are taxed on the full amount of its income distributed to them in dividend, there will be double taxation as regards part of the income so distributed, i.e., on so much as can be said to arise from profits made in the United Kingdom and already charged to tax. Thus, where in the case of a foreign company, tax has been paid on part of its income under Cases I. and III. of sch. D, and subsequently its shareholders are taxed in

(1) [1923] A. C. 744; 8 Tax Cas. 481.

(2) 7 Q. B. D. 562; 1 Tax Cas. 501.

(3) (1909) Unrep. (see Dowell's Income Tax Laws (9th ed.), pp. 737, 738).

(4) (1876) 1 P. D. 253.

(5) [1907] A. C. 81, 89.

(6) [1933] A. C. 402, 411, 412, 432, 438, 442, 446.

(7) [1938] A. C. 321, 339, 340.

respect of dividends under Case V. of sch. D, then, if some part of the dividends are attributable to profits which have already borne tax, the company is entitled to be repaid a proportionate part of that tax. If this were not so the Crown would be receiving more tax than was granted to it by Act of Parliament. If relief is given because the income of the company has borne tax, there is no logical basis for a distinction between income which has borne tax by direct assessment and income which has borne tax by deduction. The appellant company bore income tax on so much of its income as was derived both from dividends on its shareholding in, and interest received on loans made to, United Kingdom companies resident in the United Kingdom, even though that tax was borne by deduction at source, instead of by direct assessment. Further, it is the appellant company which has the right to claim the relief. Where a non-resident company's income is taxed in its hands and is then passed on to a shareholder, any tax payable on that income should be borne by the shareholder and not the company. As between the Crown and the appellant company r. 20 of the General Rules, which was originally s. 54 of the Income Tax Act, 1842, applies to all dividends paid by a company out of income which has borne United Kingdom income tax, whether or not the company be resident or incorporated in the United Kingdom. The words "any body of persons" in the rule is not and could not be limited to bodies of persons resident in the United Kingdom. The purposes of the rule are (a) recognition and affirmation of the principle that a dividend paid by a body corporate to a shareholder therein is not a new income, separate from its income, but is a part of its income, the ownership of which is, on the declaration and payment of a dividend, transferred from the body corporate to the shareholder; (b) provision of machinery for taxing the dividend received by the shareholder at its source; (c) ensuring that when the shareholder receives part of the income of the body corporate, the burden of tax attributable to that part falls on him, unless the body corporate does not exercise its right of deduction; (d) ensuring that the Crown does not receive tax more than once on the income of the body corporate, whether or not that income is distributed, and (e) affirmation of the principle that a shareholder cannot himself be assessed to tax on his dividend if it is one from which deduction of tax is authorized by the rule. Where dividends, paid by a non-

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resident company, out of income which has borne United Kingdom income tax, are subjected to the procedure of assessment under r. 7 of the Miscellaneous Rules of sch. D, the Crown is not intended to have a right to a larger amount of tax than that to which it would otherwise be entitled, nor is the company to be deprived of the right to receive and retain the tax appropriate to such dividends. The procedure under r. 7, as in the case of its precursor, s. 10 of the Income Tax Act, 1853, is mere machinery to prescribe a method of assessing and collecting at the source tax in relation to foreign dividends: see *Singer v. Williams* (1). It was introduced to implement the charge imposed by s. 54 of the Income Tax Act, 1842. There should be read into r. 7 a proviso to the following effect: "Provided that in so far as any dividends "to which the provisions of this rule apply represent dividends "from which the body of persons paying the same is entitled "to deduct the tax appropriate thereto pursuant to the "provisions of r. 20 of the General Rules of the Income Tax Act, 1918, the paying agent shall on deducting tax therefrom "retain the tax for the benefit of such body of persons. "Provided further that if the paying agent shall in fact have "paid to the Commissioners of Inland Revenue the whole of "the tax deducted by him from such dividends the said "Commissioners shall repay to the body of persons concerned "the amount which ought to have been so retained for its "benefit." As to the basis of calculation of the relief to which the company is entitled, the measure of relief so claimed depends, only (1.) on the amount of the company's income which has borne United Kingdom income tax, and (2.) on how much of that income has been distributed in dividend in the United Kingdom and so made, in the form of that dividend, liable to tax again. Accordingly it is not material whether the amount so distributed was in the form of fixed preference dividends or otherwise. *Barnes v. Hely Hutchinson* (2) does not affect the company's claim for relief. As to the method of enforcing the company's claim for relief, there was no other remedy open but a petition of right. From r. 3 of sch. C, which is incorporated in r. 7, sub-r. 2 of the Miscellaneous Rules to sch. D, it appears that the assessment of foreign dividends which is made on the paying agents is made on them as representing the individual shareholders entitled to

(1) [1921] 1 A. C. 41, 45. (2) [1938] 1 K. B. 429; [1939] 1 K. B. 93; [1940] A. C. 81; 22 Tax Cas. 655.

those dividends, and that the tax payable under such an assessment is tax charged on, and to be borne and paid by those individual shareholders; any appeal against such an assessment would, in substance be an appeal by the individual shareholders against the tax payable by them on the dividends. The present claim to relief is a claim for repayment to the company not of tax payable on the dividends by the individual shareholders but of tax previously borne by the company itself on so much of its own profits as were distributed by it to its United Kingdom shareholders. This claim has no bearing on the validity of the assessment on the dividends under r. 7 of the Miscellaneous Rules, and it could not properly be advanced or adjudicated on in any such appeal. If *Gilbertson v. Fergusson* (1) purported to decide that an appeal against the assessment on the paying agents was the proper method of enforcing the claim for relief by the company, it was wrong in that: see Income Tax Act, 1918, s. 136. [They referred to *London County Council v. Attorney-General* (2); *Attorney-General v. Ashton Gas Co.* (3); *Samuel v. Inland Revenue Commissioners* (4); *Inland Revenue Commissioners v. Blott* (5); *Neumann v. Inland Revenue Commissioners* (6) and *Allchin v. Coulthard* (7), and to the Income Tax Act, 1918, ss. 16 and 21, and rr. 19 and 21 of the General Rules and the Finance Act 1940, s. 20.]

Tucker K.C., *Grant K.C.* and *J. Clements* for the Selection Trust, Ltd. This case is indistinguishable from *Gilbertson v. Fergusson* (1), which applied the principles (a) that the distribution of a dividend by a company, whether resident or not and under whatever law incorporated, is merely a dividing up among the corporators of distributable profits of their corporation; (b) that if the profits so divided up have already borne income tax and are charged to such tax again, there will be double taxation of what in effect is the same income, and (c) that any such double taxation is contrary to the

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(1) 7 Q. B. D. 562; 1 Tax Cas. 501.

(2) [1901] A. C. 26; 4 Tax Cas. 265.

(3) [1904] 2 Ch. 621; [1906] A. C. 10.

(4) [1918] 2 K. B. 553; 7 Tax Cas. 277.

(5) [1921] 2 A. C. 171; 8 Tax Cas. 136.

(6) [1935] A. C. 215; 18 Tax Cas. 332.

(7) [1942] A. C. 607, 618; 25 Tax Cas. 445, 460.

H. L. (E.) provisions of the Income Tax Acts and, if it has in fact occurred, appropriate relief can be claimed. The present case is distinguishable from *Barnes v. Hely Hutchinson* (1) where the shares held by the taxpayer were preference shares. The Canadian Eagle Oil Co., Ltd. American company did not entrust any person in the United Kingdom with payment to the appellant company of the dividends on its common stock under r. 7 of the Miscellaneous Rules. Thus it did not bring into operation the rules of the Income Tax Acts relating to the deduction of tax from those dividends and the assessment of the person entrusted with payment of them. The appellant company as the stockholder was entitled to receive the dividends and did receive them, and accordingly it is entitled to relief. The foreign company has not brought itself within the jurisdiction of the United Kingdom revenue laws and, even if it cannot claim relief, the Crown must still give up the amount of the tax which it is not entitled to retain; the person who should receive it is the person who will ultimately bear the burden, the ordinary shareholder.

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Sir David Maxwell Fyfe A.-G., J. H. Stamp and R. Hills for the Crown. The main proposition for the respondents is that if a non-resident foreign company has income arising or accruing in the United Kingdom and pays dividends to United Kingdom shareholders, the taxation of its income and of the shareholders' dividend does not constitute taxation of the same income in hands which are to be treated as identified. A dividend paid by a foreign company to a shareholder resident in the United Kingdom is for income tax purposes income of the shareholder and not just a distributed share of the company's income and it is taxable as the shareholder's income in the hands of a paying agent under r. 7 of the Miscellaneous Rules of sch. D, if paid through such an agent, while, if it is paid direct to the shareholder it is either separately assessed under Case V. of sch. D, or if it is received by a trader in the course of his trade, it can, at the option of the Commissioners, be brought into his trading profits for assessment under Case I. of sch. D. *Gilbertson v. Fergusson* (2) is inconsistent with the principle in *Barnes v. Hely Hutchinson* (1) and was wrongly decided. This would dispose of both the appeals. A dividend paid by a foreign company

(1) [1940] A. C. 81; 22 Tax Cas. (2) 7 Q. B. D. 562; 1 Tax Cas. 655.

is a fresh income. The rules governing the taxation of dividends of companies incorporated and resident in the United Kingdom, in particular r. 20 of the General Rules, have no bearing on the taxation of the dividends of foreign companies not resident in the United Kingdom. As regards the claim for relief by the Canadian Eagle Oil Co., Ltd., the rule in *Gilbertson v. Fergusson* (1), if valid would be in relief, not of the foreign company, but of its shareholders in respect of the tax suffered by them on their dividends. If that is the correct view of *Gilbertson v. Fergusson* (1) it cannot assist the Canadian Eagle Oil Co., Ltd. If any amount of income tax in excess of the amount duly imposed by the Income Tax Acts was received by the Crown owing to the assessment of the full amount of the dividends paid by this company to its shareholders resident in the United Kingdom, the excess would not be due to or recoverable by it, but would be due to or recoverable by its shareholders: see the argument in *Gilbertson v. Fergusson* (2). The company was rightly charged to income tax by deduction or otherwise and there is no ground for any return of tax to it by reason of its having caused dividends to be paid to its shareholders resident in the United Kingdom, through the bank, and of the bank having been assessed to income tax in respect of the dividends on behalf of those shareholders under r. 7 of the Miscellaneous Rules of sch. D. In the case of Selection Trust, Ltd., the dividends paid to it by the American company were rightly taken into account in their full amount in computing, for the purpose of sch. D, the profits of its business. When the sources of income of a foreign company have suffered British taxation by deduction it is wrong to investigate these for the purpose of fixing the effective burden of taxation on its shareholders. Since 1842 there have been two different taxing codes, the one relating to United Kingdom companies and the other to income derived from foreign possessions: see Income Tax Act, 1842, ss. 40, 41, 54, 108, Case V., the Income Tax (Foreign Dividends) Act, 1842, s. 2, and the Income Tax Act, 1853, s. 10. There is a complete separation of United Kingdom and foreign companies. Further, in the case of the Canadian Eagle Oil Co., Ltd., the wrong remedy has been sought. The remedy by petition of right does not lie. Relief should have been sought in the ordinary way by appeal.

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(1) 7 Q. B. D. 562; 1 Tax Cas. 501.

(2) 1 Tax Cas. 501, 515.

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Tucker K.C. in reply. The Income Tax Act, 1918, should be so construed as not to impose two charges. He referred to *Bradbury v. English Sewing Cotton Co., Ltd.* (1); *Inland Revenue Commissioners v. Blott* (2) and *Barnes v. Hely Hutchinson* (3).

THE HOUSE took time for consideration.

July 30. VISCOUNT SIMON. My Lords, these two appeals were heard in immediate succession, in order that the House might give judgment upon them together.

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For a number of years, the appellant company received repayments of the tax deducted by the Midland Bank from dividends paid to its shareholders resident in the United Kingdom, according to the rule adopted by the Court of Appeal in *Gilbertson v. Fergusson* (4), that is to say, so much of the amount of tax deducted against shareholders of all three classes as was found by means of a proportionate sum to be attributable to that part of the company's income which was subject to United Kingdom income tax, was repaid to the company. Later this repayment was confined to a similar proportion of the tax deducted against the holders of ordinary shares alone, a practice which was not disapproved by the House of Lords in *Barnes v. Hely Hutchinson* (5). At a later stage, however, in 1940, in deference to certain observations made in that case, the proportion for repayment was calculated only in relation to the company's directly assessed income from deposits and the two categories of income on which tax was deducted against the company at the source were left out of account. The comparatively small sum thus tendered in repayment was refused by the company. As a result, the company, relying still upon the full application of the rule in *Gilbertson v. Fergusson* (4), claims to be entitled to repayment in respect of dividends on

(1) [1923] A. C. 744, 755, 763; (4) 7 Q. B. D. 562; 1 Tax
8 Tax Cas. 481, 509, 515. Cas. 501.

(2) [1920] 1 K. B. 114, 130; (5) [1940] A. C. 81; 22 Tax
8 Tax Cas. 101, 111. Cas. 655.

(3) [1939] 1 K. B. 93, 97, 103;
22 Tax Cas. 655, 661, 665.

both classes of preference shares for the years ending April 5, 1932, 1934, 1937, 1938, 1939 and 1940 (the years intervening and omitted are years in which no dividend was paid); and in respect of dividends on the ordinary shares for the year ending April 5, 1940. It is claimed that the amount repayable should be calculated, in relation to all three categories of the company's income that are charged in the United Kingdom, by the method already mentioned.

At the time when *Gilbertson v. Fergusson* (1) arose and was decided, the Income Tax Acts of 1842 and 1853 were the principal ones in force. By the latter Act, the more general terms of sch. D. in the Act of 1842, were replaced by granting the duties (so far as material to the present subject) "for "and in respect of the annual profits or gains arising or "accruing to any person residing in the United Kingdom "from any kind of property whatever, whether situate in "the United Kingdom or elsewhere"; s. 2, sch. D. Such a description includes (among many other matters) "all interest, dividends, or other annual payments payable "out of or in respect of the stocks, funds, or shares of any "foreign company" and by s. 10 of the Act of 1853 in which those words are found provision was made for the levy of the tax on this particular kind of income. This was done, it is important to notice, not by assimilating the procedure to that which regulated the levy of tax on the profits of a United Kingdom company or even of its shareholders, but by applying mutatis mutandis the provisions of s. 2 of the Income Tax (Foreign Dividends) Act, 1842, which related to dividends or shares of annuities payable out of the revenues of any foreign state. By s. 10 of the Act of 1853, then, when any "dividends in respect of the shares of "any foreign company have been entrusted to "any person in the United Kingdom for payment to any "persons in the United Kingdom," all persons "entrusted" with such payments or "acting therein as "agents" are required to do what was required of paying agents by the Income Tax (Foreign Dividends) Act of 1842; that is, putting it shortly, to render accounts, submit to assessments, and pay the duty on such dividends; and moreover (for s. 2 of the Income Tax (Foreign Dividends) Act, 1842, in its turn prays in aid the provisions of s. 93 of the Income Tax Act, 1842, relating to payments out of public

(1) 7 Q. B. D. 562; 1 Tax Cas. 501.

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revenues) to "set apart and retain" the amount of duty in making the payments to the persons entitled to receive them—in other words, to deduct the tax at the source; and s. 93 acquits and discharges the paying agents of the amount of the tax deducted as if it had been paid to the recipients of the dividends. It is manifest from a consideration of the enactments thus summarized that the only power in the revenue authorities to make repayment, or in the courts to order it, in accordance with the rule laid down in *Gilbertson v. Fergusson* (1), was for repayment, through the paying agents who had deducted the tax, to the shareholders who were entitled to receive the dividends. The company whose shares they held was not liable to the deduction of the tax nor entitled to any repayment of it; this was recognized by Cotton L.J. (2) in the passages of his judgment which were referred to by Goddard L.J. (3) in the Court of Appeal in the present case, as well as by Bramwell L.J. (4). Indeed, in *Gilbertson v. Fergusson* (1), the company was not a party; the appellant, Mr. Gilbertson, was a member and the representative of the London Committee who acted as the paying agents. So far as this point is concerned, the legal position has not been changed by the repeal of the Acts of 1842 and 1853 and their replacement by the Income Tax Act, 1918. The awkward arrangement of the relevant provisions has been but slightly modified by the Act of 1918, and their effect remains practically unaltered. By r. 7, sub-r. 1, of the Miscellaneous Rules of sch. D, "Where (a) any . . . dividends " . . . payable . . . in respect of the . . . shares . . . " of any foreign or colonial company . . . are entrusted to " any person in the United Kingdom, for payment to any " persons in the United Kingdom, the same shall be assessed " and charged to tax under this schedule by the special com- " missioners "; and by sub-r. 2, the provisions commonly called the " Paying Agents Rules " of sch. C, which are primarily concerned with interest, etc., payable out of any public revenue, are extended to the tax to be assessed and charged under r. 7. Rule 3 of the Paying Agents Rules directs the person entrusted with payment, out of the moneys in his hands, " to pay the tax on the dividends on behalf of the

(1) 7 Q. B. D. 562; 1 Tax
Cas. 501.

(2) 7 Q. B. D. 562, 574; 1 Tax
Cas. 501, 520.

(3) (1944) 171 L. T. 42, 46.

(4) 7 Q. B. D. 562, 563; 1 Tax
Cas. 501, 516, 517.

“persons entitled thereto”; and he is to be acquitted in respect of all such payments. The substantive authority for charging dividends in respect of shares in a foreign or colonial company with tax is given by para. 1, of sch. D:—“Tax under this schedule shall be charged in respect of (a) the annual profits or gains arising or accruing (i.) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere”; and but for r. 7 just quoted, such dividends would be charged by direct assessment on the recipient under Case V.

The provision of the Income Tax Act, 1918, by which deduction at the source is authorized in the case of dividends in respect of shares in companies resident in the United Kingdom, stands in sharp contrast to the rules which relate to dividends of foreign companies. It forms the latter part of r. 20 of the General Rules (applicable to schedules A, B, C, D and E). This rule begins with an obviously necessary direction that a body of persons is to be charged on the full amount of its profits “before any dividend thereof is made,” and continues by providing that “the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto.” There is here, as has often been pointed out, no *duty* imposed on the company to deduct tax such as appears in r. 7 of the Miscellaneous Rules of sch. D; nor is it liable to any assessment for the tax on the dividends. The liability of the company to tax does not depend upon the distribution of dividends, nor has it any direct relation to their amount; it is based upon and ascertained according to the cases, rules and sections that may be applicable to the particular kinds of income chargeable with United Kingdom tax that the company enjoys. Any direct assessment on the company would be made on the total amount of its profits thus ascertained, whether the amount of the dividends distributed were greater or less, and even if no part of these actual profits were distributed at all. These characteristics of r. 20 are illustrated by the fact that the legislature has found it necessary in the well-known provisions of s. 21 of the Finance Act, 1922 (the scope of which has been more than once enlarged) to impose the surtax on the undistributed income of certain companies, and through them on their shareholders; and, on the other hand, in s. 20 of the Finance Act, 1940, to provide for the “grossing” of dividends paid

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without a full deduction of tax. For if the distribution of dividends by the company and the deduction of income tax against them on payment to the shareholders bore any necessary relation to the company's taxable profits, or if such deduction were obligatory, the gross amount of those profits would automatically be apportioned to each of the shareholders, and form part of his "total income" for the purposes of surtax, as well as for the purpose of calculating his personal and other reliefs. Rule 20 of the General Rules in the Act of 1918 is itself the successor of the middle portion of s. 54 of the Act of 1842; with this perhaps not insignificant alteration that, whereas s. 54 provides that the recipients "shall *allow* out of such dividends a proportionate *deduction* "in respect of the duty so charged," r. 20 in direct words entitles the body of persons which is charged on its profits "to *deduct* the tax appropriate thereto." Now although the definition of "body of persons" in s. 237 of the Act of 1918 is sufficiently wide to cover a company not residing in the United Kingdom, the definition does not apply if "the context "otherwise requires" and it is manifest that r. 20 is inapplicable to such a body. The tenour of that rule (as well as of its precursor) when read as a whole indicates that it is intended to relate only to a company or other body which is chargeable to tax in the United Kingdom on all its profits from whatever source derived. To come down to details, if r. 20 were applicable to a foreign company, the company itself might deduct the tax against its shareholders in the United Kingdom, before remitting the net amount to the "person "entrusted" as the channel for distribution here; the paying agent would be obliged to hand over to each shareholder the net amount thus allocated to him; and when an assessment came to be made on the paying agent under r. 7 of the Miscellaneous Rules, he would be left with no money in his hands out of which to pay the tax. In order to obviate this and other difficulties and to reconcile the two rules so that r. 7 might be read as subordinate to r. 20, Mr. Tucker on behalf of the appellants felt compelled to submit to the House an elaborate and ably drafted pair of provisos which he asked the House to read into r. 7. It need only be said that r. 7 is clear on the face of it and when read with the Paying Agents Rules of sch. C, which it incorporates, is comprehensive enough to cover the whole ground with which it purports to deal; there is therefore no warrant for reading into r. 7

words, and indeed whole sentences, which are not to be found there. Rule 7 of the Miscellaneous Rules and r. 20 of the General Rules are not capable of being harmonized, for they are not in *pari materia*. It was further argued that r. 7 of the Miscellaneous Rules and its precursor, s. 10 of the Act of 1853, are mere machinery provisions to prescribe a method of assessing and collecting at the source tax in relation to foreign dividends, and that is certainly the case. But the argument goes on to suggest that this machinery was introduced in order to implement the charge imposed a number of years earlier by s. 54 of the Act of 1842; and this suggestion is not well-founded. Section 54 did not impose a charge; it was itself a machinery provision, even more obviously so than r. 20 of the General Rules in the Act of 1918, for it begins and ends with directions as to the delivery of statements. The Act of 1842, however, provided no machinery for the collection of tax on dividends paid by foreign companies, other than as a result of direct assessment on individual shareholders, as in the case of other profits charged with tax under Case V.; the Act of 1853 by s. 10 provided the much more convenient procedure by which the paying agent could be assessed, and compelled to pay the tax and deduct it against the recipient of the dividend. This, and not the filling up of any gap left in s. 54 of the Act of 1842, was the improvement effected by s. 10 of the Act of 1853. Two further points remain to be noted in connexion with the statutory enactments referred to in the course of the argument. General Rules 19 and 21 (like the provisions of the earlier Acts which they replace) deal with interest and "other annual payments"; they have no bearing on dividends, even dividends on preference shares, for dividends are not "annual payments," their distribution depending in every instance upon a specific declaration by the company. Again ss. 16 and 17 of the Income Tax Act, 1918, refer to allowances and deductions specifically granted by that Act and the Acts amending it, such as the personal allowances, life assurance allowances, allowances for children and so forth, and have nothing to do with the subject of the present appeal.

From the foregoing consideration of the enactments in force at the time of the decision in *Gilbertson v. Fergusson* (1), and of those now current, it emerges clearly that the rule adopted in that case enures for the benefit of the shareholders and not

(1) 7 Q. B. D. 562; 1 Tax Cas. 501.

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of the foreign company itself. This conclusion is consistent with the decision of the House in *Barnes v. Hely Hutchinson* (1) already referred to ; for if the rule were for the benefit of the company, it could obviously make no difference that some of the shareholders are entitled to dividends at a fixed rate, and others only at a rate which is determined afresh at each declaration. Even on the assumption therefore that the rule is well founded, the appellant company is not entitled to the benefit of it. There is also a subsidiary point ; r. 7 of the Miscellaneous Rules of sch. D provides, as has been seen, for the assessment of dividends from shares in foreign companies by the Special Commissioners under that schedule. A right of appeal against an assessment under sch. D by those commissioners is granted by s. 147 of the Act of 1918 to the person assessed, who is in this case the paying agent ; and no reason is apparent for excluding an assessment under r. 7 from the general words of s. 147. If there is to be a repayment of tax assessed under r. 7 it must be because the assessment was excessive ; and it is the person assessed who is aggrieved. Where there is another and not less convenient remedy a petition of right will not lie ; see *Holborn Viaduct Land Co. Ltd. v. The Queen* (2), where the claim was in some respects comparable with that made in the present case.

These observations might be sufficient to dispose of the present appeal ; but the question whether the rule in *Gilbertson v. Fergusson* (3) is in conformity with the Income Tax Acts has been fully argued both in this appeal, and in that of *Selection Trust, Ltd. v. Devitt* where it arises in a somewhat different form. The validity of that rule comes therefore for a third time under the scrutiny of the House, and it is right that that general question should now be decided once and for all. Mr. Gilbertson and his colleagues were the representatives in England of the Imperial Ottoman Bank, a Turkish corporation whose principal business was carried on in Turkey, but which also carried on some business in the United Kingdom, though it was not resident here. It had shareholders in the United Kingdom, and paid their dividends through the agency of Mr. Gilbertson and his committee. In the material year, the profits earned by the bank in this country, and remaining in the paying agent's hands, were sufficient in amount to pay the dividends of the shareholders in the United

(1) [1940] A. C. 81 ; 22 Tax
 Cas. 655.

(2) (1887) 2 Tax Cas. 228.

(3) 7 Q. B. D. 562 ; 1 Tax Cas. 501.

Kingdom, without any remittance from Turkey, and the claim was made that therefore no charge at all could be imposed on Mr. Gilbertson in respect of the dividends. It was contended on his behalf (1) that s. 10 of the Act of 1853 applied only to sums remitted from abroad in order to pay dividends here. This contention had commended itself to Kelly C.B. who delivered a dissenting judgment in the Exchequer Division (2); but the other judges of that court barely allude to it, and none of the members of the Court of Appeal refers to it directly. For the Revenue, on the other hand, it was conceded that some abatement or repayment should be made to the paying agent; although he had in the first instance been assessed (somewhat tentatively it would appear) by the Special Commissioners on the full amount of the dividends. Mr. Dicey in the Court of Appeal claimed no more on behalf of the Revenue than that (3) income tax was payable "on the portion of the dividends paid to persons "resident in England which arises from foreign profits," the bank itself being liable to tax on the whole of the English profits. This claim succeeded; and the paying agent's appeal was dismissed. It is well to bear this fact in mind; for the majority in the Exchequer Division, and the judges of the Court of Appeal, were not adjudicating on a claim to charge the paying agent with tax in respect of the whole amount of the dividends he had paid to the shareholders, and consequently cannot be taken to have rejected such a claim. What was no doubt in the minds of the Revenue and its advisers in taking this course, as well as of the judges in approving it, was the view then prevailing that a company charged with, and paying, tax under sch. D, for example in respect of profits accruing to it in the United Kingdom, was assessed and paid the tax as agent on behalf of its shareholders. Thus in the Court of Appeal, Brett L.J. commenced his judgment by saying (4) that the first question is "who are "the persons intended to be charged *ultimately* with the "income tax," and further on his Lordship said (5): "it "would be so clearly unjust and obviously contrary to the "meaning of the statute that the Government should have "the tax payable twice over by the same persons in respect

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(2) (1879) 5 Ex. D. 57, 76.

(3) 1 Tax Cas. 501, 515.

(4) 7 Q. B. D. 562, 569; 1 Tax
Cas. 501, 517.(5) 7 Q. B. D. 562, 570; 1 Tax
Cas. 501, 518.

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“ of the same thing, that, I should say it was a necessary
 “ implication that that could not be right. Therefore, if part
 “ of the dividends in respect of which the income tax is payable
 “ is also in respect of profits earned from a business in England,
 “ the tax on that part would have to be paid twice over
 “ which ought not to be ; and as to that, there should be
 “ a deduction.” And Cotton L.J. said (1) : “ that when duty
 “ is charged as against *the person* in one part of the Act he is
 “ not to be charged again . . . ” (this passage will have to
 be considered again in another connexion) ; the final sentences
 of his Lordship’s judgment are based on the same underlying
 position. But that position is demonstrably wrong ; and the
 contrary view has now prevailed for a quarter of a century.
 The law was thus declared by Viscount Cave in *Inland Revenue
 Commissioners v. Blott* (2) : “ Plainly, a company paying
 “ income tax on its profits does not pay it as agent for its
 “ shareholders. It pays as a taxpayer, and if no dividend
 “ is declared, the shareholders have no direct concern in the
 “ payment. If a dividend is declared, the company is entitled
 “ to deduct from such dividend a proportionate part of the
 “ amount of the tax previously paid by the company and, in
 “ that case, the payment by the company operates in relief of
 “ the shareholder. But no agency, properly so called, is
 “ involved.” That view has been acted on in subsequent
 decisions, notably in that of the House of Lords in *Cull v.
 Inland Revenue Commissioners* (3), where Lord Atkin stated
 the law thus : “ My Lords, it is now clearly established that in
 “ the case of a limited company the company itself is chargeable
 “ to tax on its profits and that it pays tax in discharge of
 “ its own liability and not as agent for its shareholders.
 “ The latter are not chargeable with income tax on dividends,
 “ and they are not assessed in respect of them. The reason
 “ presumably is that the amount which is available to be
 “ distributed as dividend has already been diminished by
 “ tax on the company, and that it is thought inequitable to
 “ charge it again. At one time it was thought that the
 “ company in paying tax paid on behalf of the shareholder :
 “ but this theory is now exploded by decisions in this House :
 “ and the position of the shareholders as to tax is as I have

(1) 7 Q. B. D. 569, 572 ; 1 Tax
 Cas. 501, 519.

(2) [1921] 2 A. C. 171, 201 ;
 8 Tax Cas. 101, 136.

(3) [1940] A. C. 51, 56 ; 22 Tax
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"stated it." And Lord Russell of Killowen, looking at the matter from a different angle, said (1) "that while the amount which [the company] could have deducted as the 'tax appropriate thereto' has been definitely fixed at the standard rate for the year in which the amount of the dividend became due, it is in no way comparable with the tax payable by the company itself." In face of the law thus established it is impossible now to hold that a shareholder in a foreign company who suffers a deduction of tax in respect of his dividend under r. 7 of the Miscellaneous Rules of sch. D, or the paying agent who is charged on behalf of the shareholders and hands over the tax to the Revenue under the Paying Agents Rules incorporated by r. 7, is paying tax a second time upon a dividend which has already been taxed. The ratio decidendi of *Gilbertson v. Fergusson* (2) is gone; and the rule adopted in that case is not consistent with the true facts, or with the law as now understood. Further it was assumed in that case that there was a general principle to be applied in construing the Income Tax Acts that tax is not "payable twice over by the same person in respect of the same thing," as Brett L.J. said (3); or as it was put by Cotton L.J. (4): "I take it there would be this implied exception, that when duty is charged as against the person in one part of the Act he is not to be charged again under another part, applying no doubt in terms to him, but intended to include those who have not been charged under the preceding part"; and again (5): "where the dividend has already been taxed then, by the necessary implication of the statute, the duty is not again to be paid upon it." Now there have certainly been cases in which some such inference has been drawn from particular provisions of the Income Tax Acts, as was done, for instance by the House of Lords from r. 10 of No. IV. of sch. A in the Act of 1842, s. 24, of the Customs and Inland Revenue Act, 1888, and the other enactments considered in *London County Council v. Attorney-General* (6). But the opinions delivered by Lord Macnaghten and Lord Davey in that well-known case proceed upon a meticulous construction of those particular provisions and not

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Cas. 603, 640.

(2) 7 Q. B. D. 562; 1 Tax Cas. 501.

(3) 7 Q. B. D. 562, 570; 1 Tax
Cas. 501, 518.(4) 7 Q. B. D. 562, 572; 1 Tax
Cas. 501, 519.(5) 7 Q. B. D. 562, 574; 1 Tax
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(6) [1901] A. C. 26; 4 Tax Cas. 265.

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upon the supposition of any general principle underlying them, and remaining unexpressed. No such supposition is legitimate. In the words of the late Rowlatt J., whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase, "in a taxing Act one has to look merely "at what is clearly said. There is no room for any intendment. "There is no equity about a tax. There is no presumption "as to a tax. Nothing is to be read in, nothing is to be "implied. One can only look fairly at the language used." (*Cape Brandy Syndicate v. Inland Revenue Commissioners* (1). Looking fairly at the language used in r. 7 of the Miscellaneous Rules of sch. D to the Act of 1918 which governs the present case (as its predecessor, s. 10 of the Act of 1853 governed the case of *Gilbertson v. Fergusson* (2)) it is clear that a charge is there imposed on dividends payable in respect of the shares of any foreign company without any reference to the sources of that company's income. There is nothing in either provision to imply that the charge upon the dividends is to be abated in proportion as the income is itself chargeable, or not chargeable, to British income tax. No general principle can be set up which would make any such abatement "a necessary implication of the statute." The thesis which lies at the root of the decision in *Gilbertson v. Fergusson* (2) is unsound, and for this reason, as well as for the reasons previously given, this appeal fails.

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In the circumstances of this case, the appellant company seeks to have the benefit of the rule adopted in *Gilbertson v. Fergusson* (2). It claims that from the computation of its profits for the purpose of Case I. of sch. D there should be omitted a part of the dividends received from the American company proportionate to so much of the American company's profits as is derived in its turn from the dividends of the shares of the five British companies paid to the American company under deduction of British income tax. It is unnecessary to consider the actual figures which are to be found in the special case. Even if the rule in *Gilbertson v. Fergusson* (2) were well founded (which for the reasons just given in the appeal of the Canadian Eagle Oil Co., Ltd. it is not), it would be impossible in the present circumstances to

(1) [1921] 1 K. B. 64, 71.

(2) 7 Q. B. D. 562; 1 Tax Cas. 501.

say that the dividends paid by the American company to the appellant company have themselves borne British income tax, although it may be that the general profits of the American company out of which those dividends were paid would have been greater if there had been no deduction of British income tax on the dividends received by the American company from the five British companies in which they held shares. That consideration is far too remote to justify the assertion that when the appellant company pays tax on its trading profits as they have been computed for the purpose of the charge under Case I. of sch. D, it has been called on to pay the tax twice over in respect of the same thing. Such an extension of the rule in *Gilbertson v. Fergusson* (1) would be contrary to the reasoning of Lord Atkin and Lord Wright in *Barnes v. Hely Hutchinson* (2). Consequently even on this ground alone, the judgments of Macnaghten J. and of the Court of Appeal, given when it was still assumed that *Gilbertson v. Fergusson* (1) was good law, were right and should be approved. But, as has been decided in the appeal of the Canadian Eagle Oil Co., Ltd., the rule there adopted can no longer be supported; and the appeal fails. I move that these two appeals be dismissed with costs.

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LORD THANKERTON. My Lords, I agree with the opinion of my noble and learned friend on the woolsack, which has just been delivered, and which I had an earlier opportunity of considering. It expresses fully my views in its reasons and its conclusions, and I will only add observations on two points of crucial importance in these cases. In the first place, in the first of these cases, it appears to me that the contentions of the appellant company require their being able to invoke the provisions of r. 20 of the General Rules applicable to all schedules in their favour, but, in common with my noble and learned friend, I am of opinion that it does not apply to the case of a non-resident body of persons, who are beyond the range of British taxing Acts, and are therefore outside the opening words of the rule. In the second place, I am of opinion that the principle embodied in the decision in *Gilbertson v. Fergusson* (1) is so wrong, and might be so far-reaching, that, despite the lapse of time, it should not be left uncorrected. That principle, in my opinion, is to be

(1) 7 Q. B. D. 562; 1 Tax Cas. (2) [1940] A. C. 81; 22 Tax Cas. 501. 655.

H. L. (E.) found in the judgment of Brett L.J., afterwards Lord Esher (1) :
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" Now it may be true that there are no specific words in this
 " statute which point out that the Government are not to
 " receive the tax twice over, but it would be so clearly unjust
 " and obviously contrary to the meaning of the statute that
 " the Government should have the tax payable twice over by
 " the same person in respect of the same thing, that I should
 " say it was a necessary implication that that could not be
 " right." It is clearly beyond the province of the courts
 either to correct hardship or afford justice by an implication
 which is not based on the language of the statute.

LORD RUSSELL OF KILLOWEN. My Lords, the main question which is raised in these two appeals, though from a different angle in each, may, I think be stated thus :—In taxing a person resident in the United Kingdom in respect of his income arising from dividends on shares in a foreign company (i.e. in respect of income arising from possessions out of the United Kingdom under Case V. of sch. D), should relief from taxation be given as regards so much of that income as can be shown to have already borne tax in the United Kingdom? The claim to such relief is asserted in each appeal, but in the first appeal the benefit of the relief is claimed by the foreign company, while in the second appeal it is claimed by its shareholder, who is taxed under Case V. The ground upon which the relief is claimed is the alleged necessity of avoiding what is alluded to as " double taxation." The normal meaning of double taxation is that the same person pays tax twice on his income ; but the present relief is claimed not upon that footing, but upon the theory that if the income of a foreign company, out of which a dividend is paid to a shareholder resident here, can on being analysed and traced to its origin be shown to have at some time, as to some portion thereof, borne tax in the United Kingdom, then if the shareholder is taxed on the full amount of the company's income which is distributed to him in dividend, double taxation will have taken place as regards a portion of the income distributed to him as dividend, viz. on so much as can be said to arise from profits made in the United Kingdom which have already been charged to tax. The theory that this species of double taxation gives rise to a claim to exemption from or repayment of tax must rest on some express enactment in the Income Tax Acts, or

(1) 7 Q. B. D. 562, 570 ; 1 Tax Cas. 501, 518.

on some principle to be implied from those Acts, or to be found in the common law. Express provision there is none. On principle, double taxation in the strict sense which I have indicated would, in default of express provision, no doubt be wrong: the Crown may choose the Case under which it taxes the subject, but it cannot tax the subject in respect of his income under one Case, and tax him again in respect of it under another. But I am unable to state, or justify, any principle (to be implied from the Acts or existing at common law) to support the view that it is illegal for the Crown to levy and retain the tax on the full amount of its profits distributed in dividends declared by a foreign company in favour of a shareholder resident here, because some part of the income out of which those dividends have been declared can be traced back to a source in which it has been taxed in the United Kingdom. That some such principle giving rise to the present claims did exist was decided many years ago in *Gilbertson v. Fergusson* (1) and was accepted and acted upon by the Revenue authorities until recently. Its correctness has now been challenged. The Court of Appeal, in the present cases, were bound by that decision, but they decided the present appeals in favour of the Crown on other grounds. In your Lordships' House, however, *Gilbertson v. Fergusson* (1) is open to review. Its correctness has been challenged before us and we cannot, I think, avoid the task of determining whether or not it should, notwithstanding its respectable age of sixty-four years, be overruled. There is no valid reason why, if we think that it was wrongly decided, it should not be overruled. Its long standing has only resulted in some taxpayers reaping a benefit for a time, during which the Revenue has suffered loss. No title has been created or affected by the decision, nor will any title be weakened or jeopardized by its being overruled. This theory about double taxation in the circumstances mentioned has no doubt arisen from the fact that in the legislation relating to income tax a departure has been made in one respect from the consequences which should logically have followed from the fact that a limited company is a legal entity separate and distinct from the individuals who are the owners of its share capital. Logically there would be no answer to the view that a company's income is one taxable income, and that the profits which it distributes to its shareholders out of its taxed income in dividends constitute another and new income,

(1) 5 Ex. D. 57; 7 Q. B. D. 562; 1 Tax Cas. 501.

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taxable again in the shareholder's hands. But as was said by Lord Phillimore in *Bradbury v. English Sewing Cotton Co., Ltd.* (1): "Their taxation would seem to be logical, but it would "be destructive of joint stock company enterprise"; and he points out that the Act of 1842 apparently proceeded on the idea that for revenue purposes a joint stock company should be treated as a partnership, "so that the payment of income tax "by a company would discharge the quasi-partners." The provisions of the Act of 1842, which result in this fictional treatment of the relationship between a joint stock company and its shareholders are now to be found in rr. 1 and 20 of the General Rules. Under r. 20 the company, having been charged on the full amount of its profits and gains, is entitled to deduct tax from the dividends which it pays, the tax which it can so deduct being now (see Finance Act, 1927, s. 39, sub-s. 1) tax at the standard rate for the year in which the dividend is declared, irrespective of the rate or rates at which tax was paid by the company on the profits and gains out of which the dividend is being paid. The procedure indicated by r. 20 is accordingly an artificial device by means of which a shareholder's income from dividends of a joint stock company is protected from being treated as a new taxable income in his hands, but as a result of which the company, in shifting the burden on to the shoulders of the shareholder, may well recoup itself a larger sum than the Revenue had received from it. As Lord Atkin pointed out in *Cull v. Inland Revenue Commissioners* (2), the shareholder pays no tax, in the sense that the Revenue receives nothing from the shareholder, and receives no tax except what it has already received from the company. The shareholder, however, bears the burden of what the company has paid (and perhaps more), and has certainly paid tax by deduction within the meaning of s. 29 of the Income Tax Act, 1918. But to contend that the same considerations which prompted (as regards resident companies) the provisions of the Act of 1842, now represented by r. 20, apply, or should be applied, to the case of foreign companies is quite another matter, and it is the examination of this question which must determine whether *Gilbertson v. Fergusson* (3) was rightly decided.

(1) [1923] A. C. 744, 769; 8 Tax Cas. 481, 518.

(3) 7 Q. B. D. 562; 1 Tax Cas. 501.

(2) [1940] A. C. 51, 56; 22 Tax Cas. 603, 636.

Certain propositions which were discussed in the course of the arguments before us appear to me to be beyond question. (1.) Dividends paid by a foreign company and received in the United Kingdom constitute income arising from possessions out of the United Kingdom, and are taxable under Case V. of sch. D. (2.) Rule 20 does not enable a foreign company to deduct any British income tax from dividends paid by it direct to a shareholder resident in the United Kingdom. The rule (in its application to a limited company) envisages a charge on the full amount of its profits before payment of a dividend to its shareholders, followed by a payment of a dividend to its shareholders, from which the company may deduct tax at the standard rate on the whole dividend. (3.) If the foreign company (as is most probable) does not pay dividends direct to shareholders resident in the United Kingdom, it must resort to r. 7 of the Miscellaneous Rules applicable to sch. D, which makes applicable the rules (under sch. C) as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland and the National Debt Commissioners are entrusted. Under r. 3 of those rules, there is no escape from the position that tax on the full amount of the dividend has to be paid on behalf of and borne by the shareholder. These appeals then resolve themselves into cases of a taxpayer resident here taxed under Case V. of sch. D in respect of dividends paid by a foreign company to a person resident in the United Kingdom (in the one case) in the manner indicated in r. 7 and (in the other case) direct without deduction of tax. They are the exact cases contemplated by Lord Phillimore in *Bradbury v. English Sewing Cotton Co., Ltd.* (1) when he said: "But the British taxpayer may be receiving "annual sums from foreign possessions and thus become "liable to be assessed and taxed . . . according to Case V. "of sch. D. And it matters not what the foreign possession "is, whether it is land or goods or shares in a foreign "company. The periodic sums which are so remitted to "him . . . are liable to assessment and taxation, not "because they are dividends or shares in foreign companies, "but because they are remittances from foreign sources. "The officers of the Crown do not know and do not care what "is the character of the sources from which the money comes." And I would myself add that I am not aware of any means by which those officers could insist on a disclosure of or verify

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the pedigree or sources of the income out of which a foreign company was paying any particular dividend. The case is simply that such income is liable to assessment and taxation under Case V. of sch. D ; and since the tax legislation contains no provision in reference to the case, corresponding to r. 20, it must be treated as new income in the hands of the shareholder, and no question of the alleged or any other double taxation can arise. The case of *Gilbertson v. Fergusson* (1) was a similar case. The facts were more complicated, and some confusion is apparent in the judgments between the position of the London agency as carrying on the bank's business in the United Kingdom and its position as the person entrusted with the payment of dividends to persons in London, within s. 10 of the Income Tax Act, 1853, the provision then in force corresponding to the before-mentioned r. 7. But the essence of the decision was as follows :—The London agency had been assessed on the full amount of the dividends paid in London. It was held that since those dividends were payable out of the general earnings of the bank, which were composed partly of profits made in the United Kingdom (which had already been taxed under Case I. of sch. D) and partly of profits made elsewhere, the agency should only be assessed under s. 10 on so much of the dividends as were paid out of the profits made elsewhere than in the United Kingdom. If that decision is right, a claim to some relief and repayment would arise in the present cases. In my opinion, however, the decision was wrong. It was based upon the view, which I think erroneous, that some general principle was to be found in the taxing Acts, either expressly or by implication, which prohibited double taxation in the sense which I have indicated. Brett L.J. (2) calls it “ the meaning “ of the statute,” while Cotton L.J. (3) speaks of “ the “ necessary implication of the statute.” To exclude the power to exact such double taxation you must find some provision to that effect. As regards a company resident here and its shareholders, r. 20 prevents what the shareholder receives from the company in dividend being treated as new taxable income in his hands ; but r. 20 does not apply to a foreign company, and there is nothing in the tax legislation to justify the view that income (whatever its pedigree) received by a person resident here from his shareholding in a foreign

(1) 7 Q. B. D. 562 ; 1 Tax Cas. 501.

(3) Ibid. 574 ; 520.

(2) Ibid. 570 ; 518.

company should not be taxed as new income in his hands under Case V. of sch. D. I would dismiss both appeals.

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LORD MACMILLAN. My Lords, encouraged by a recent success in an affair of outposts (*Barnes v. Hely Hutchinson* (1)), the Inland Revenue authorities have now in these appeals launched a frontal attack on what is known as "the rule in *Gilbertson v. Fergusson* (2)." Speaking of *Gilbertson v. Fergusson* (2), Lord Atkin said (3): "This House would "hesitate long . . . before infringing a decision of such "long standing and so often acted upon." Despite this admonition, your Lordships are invited to hesitate no longer and boldly to declare that the decision was wrong and must be overruled. The problem may be stated in general terms. A company not resident in the United Kingdom, which I shall call "the foreign company," derives part of its income from business carried on in the United Kingdom, on the profits of which it pays income tax by direct assessment on its agents here, or from dividends paid to it by companies in the United Kingdom in which it has shares and from which dividends income tax has been deducted. The total income of the foreign company is thus composed in part of income which has borne income tax either by direct assessment or by deduction. The foreign company also happens to have shareholders resident in the United Kingdom. To these shareholders it pays dividends out of its total available income either individually or by transmitting to agents in the United Kingdom a block sum sufficient to pay all dividends due to its shareholders in the United Kingdom, entrusting to these agents the task of distributing to each individual shareholder his appropriate dividend. The dividends distributed to shareholders in the United Kingdom are thus seen to be paid out of moneys which in part have already borne income tax, to the extent of the proportion which the part of the company's income which has borne income tax bears to its total income. Consequently if income tax is exacted in respect of the full amount of the dividends paid by the foreign company to its shareholders in the United Kingdom this is pro tanto to subject the same income to double taxation. So ran the successful argument in *Gilbertson v. Fergusson* (2), in which it was held

(1) [1940] A. C. 81; 22 Tax Cas. 655. (3) [1940] A. C. 81, 89; 22 Tax (2) 5 Ex. D. 57; 7 Q. B. D. 562; Cas. 655, 672.

1 Tax Cas. 501.

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that proportional relief must be given. It is important to consider the circumstances in which that decision was pronounced. There the foreign company, the Imperial Ottoman Bank, earned profits in London from business transacted there. On these profits it paid income tax through its London agency. These profits were merged with its profits made outside the United Kingdom and from its total profits thus ascertained dividends were paid to its shareholders in the United Kingdom. The profits earned in the United Kingdom were sufficient in amount to pay the whole dividends to the United Kingdom shareholders, and as income tax had already been paid on the profits earned in the United Kingdom it was contended that no further income tax was exigible in respect of the dividends paid to United Kingdom shareholders. This contention failed because the dividends paid to the United Kingdom shareholders were not paid solely out of the profits earned in the United Kingdom, but were paid out of the total profits of the foreign company, both those earned within and those earned outside the United Kingdom. So far as the dividends paid to United Kingdom shareholders were attributable to profits earned out of the United Kingdom, no income tax had been paid thereon, and the claim of the Inland Revenue which succeeded was that to this proportional extent the dividends paid to United Kingdom shareholders were liable to income tax. I note particularly the passage in the judgment of Pollock, B., where he states (1): "To the extent that the amount paid by way of dividend consisted of profits earned in the United Kingdom, the commissioners admitted that this amount, having been taxed once as profits, was not further liable." In view of this admission and of the way in which the case was presented, it is not surprising that the decision took the form which it did. The Inland Revenue authorities make no such admission in the present cases and they submit that they made an error in law in so admitting in *Gilbertson v. Fergusson* (2). I pause to disencumber the question of a complication which in my view has no material bearing on it. In *Gilbertson v. Fergusson* (2) the money necessary to pay the dividends to the United Kingdom shareholders was entrusted in block (so it was held) to paying agents in London for distribution. As part of the general machinery of income tax collection at the source it is

(1) 5 Ex. D. 57, 74.

(2) 7 Q. B. D. 562; 1 Tax Cas.

provided that where a foreign company adopts this convenient course, then the paying agents in the United Kingdom shall be accountable for tax on the dividends in block. But it is expressly declared in the statute that the paying agents "pay the tax on the dividends on behalf of the persons "entitled" to the dividends. In *Gilbertson v. Fergusson* (1) the appeal was taken on behalf of the London agents of the Imperial Ottoman Bank, who had been assessed to tax on the sum entrusted to them for payment of the dividends to the United Kingdom shareholders, and the question who were properly entitled to the relief which the court found to be due does not appear to have been discussed. In the first of the two present appeals it is the foreign company which as suppliant craves repayment to itself or to its London agents of the tax alleged to have been doubly assessed. In the other present appeal it is the United Kingdom shareholder in a foreign company who claims relief in respect of tax on dividends received direct from the foreign company, in so far as these dividends have been paid by the foreign company out of dividends received by it under deduction of tax from United Kingdom companies. If it were necessary to express an opinion as to the proper party entitled to relief, if any, I should agree with the view of Goddard and du Parc L.J.J. (2) that it would be the United Kingdom shareholder who would be entitled to the relief and not the foreign company. This in itself would be a sufficient ground for dismissing the first of these appeals. So far as the question of principle is concerned, it seems to me immaterial whether the United Kingdom shareholder in a foreign company receives his dividends direct from the foreign company without deduction of tax and is then taxed directly on the amount thereof or receives his dividends from agents in the United Kingdom of the foreign company who have been entrusted with the requisite funds, and having paid tax thereon on behalf of the shareholders, pay their dividends to them less tax. This is all merely machinery. The point is whether, in the type of case represented by *Gilbertson v. Fergusson* (1) and the appeals now before the House, the same income within the meaning of the Income Tax Acts is really being subjected to double taxation. The key to the problem is to be found in the fundamental distinction drawn in the income tax code between

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(1) 7 Q. B. D. 562; 1 Tax Cas.

(2) 171 L. T. 42, 46, 47.

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income arising from sources in this country and income arising from sources outside the United Kingdom. The income of a British taxpayer, so far as earned or received from sources within the United Kingdom, is dealt with in one way, and his income so far as received from sources abroad is dealt with in another way, and for the very good reason that sources of income in this country are subject to the jurisdiction of the government of this country, which can enact laws and make regulations as to returns, accounts and investigations which it has no power to do in respect of sources of income outside the United Kingdom. So far as a British taxpayer has a source of income arising from possessions out of the United Kingdom, the revenue laws of this country have no operation on that source. It is only in so far as income from that foreign source is received by, or in some cases credited to, a resident within the United Kingdom that it comes within the purview of British taxation at all. The British revenue authorities have no means of analysing or investigating such income from foreign sources. All that they have power to ascertain from the British taxpayer is the amount of his income derived therefrom. Thus in the case of income from stocks, shares or rents abroad, the tax is directed to be computed on the full amount thereof and with that full amount alone are the British revenue authorities concerned. They have no power to pursue inquiries abroad as to the prior history or provenance of such income. "The officers of the Crown do not know and do not care what is the character of the sources from which the money comes" (per Lord Phillimore in *Bradbury v. English Sewing Cotton Co., Ltd.* (1)). The topic has been darkened rather than illumined by a false analogy which it has been sought to draw with the case of the taxation of the income of United Kingdom companies and their shareholders. It is true, as Lord Phillimore points out in the case just cited (2), that in the system of taxation in this country a company and its shareholders are for economic reasons treated as if they constituted a partnership having a single income, the tax on which is paid by the company, the shareholders being thereby discharged of liability to tax (apart from sur-tax) on their dividends or shares of the company's income. The company recoups itself by deducting income tax from the dividends which it pays to its shareholders.

(1) [1923] A. C. 744, 770; 8 Tax Cas. 481, 519.

(2) [1923] A. C. 744, 769; 8 Tax Cas. 481, 518.

The system is highly artificial, for the tax is deducted at the standard rate obtaining when the dividends are paid, while the profits out of which the dividends are paid may have been earned in previous years and have borne tax at a higher or a lower rate, and a company does not usually distribute in dividends in any one year all the profits of that year on which it has paid tax. But this is a domestic expedient limited in its operation to this country. It has no application to foreign companies. A foreign company paying dividends to its shareholders within the United Kingdom is not subject to British revenue laws or practice. It cannot pay dividends to its United Kingdom shareholders under deduction of a tax of which it has no knowledge and to which it is not subject except in so far as it derives income from a source in this country. It pays its dividends to its United Kingdom shareholders either directly or through paying agents in this country and then leaves our domestic revenue laws to operate upon the money so transmitted.

The so-called "rule in *Gilbertson v. Fergusson* (1)" is open in my opinion to at least one insuperable objection. It is agreed that the relief which it gives is not relief against the whole tax exigible on the foreign dividends, but only to the extent of the proportion which that part of the foreign company's income which has borne British tax bears to the total income of the foreign company, for the British shareholder's dividend is only in part paid out of income which has borne tax. But how is this proportion to be ascertained? The foreign company doubtless has quite different rules for arriving at its total profits from the artificial rules which apply to the ascertainment of the profits of a British company. One essential factor in the ascertainment of the extent of the relief under the rule in *Gilbertson v. Fergusson* (1) is thus entirely beyond any means of criticism and control on the part of the revenue authorities. This seems to me a quite untenable position. Incidentally I may point out that if the foreign company were to pay dividends to its British shareholders under deduction of tax, the amount to be deducted would be dependent on this same unverifiable factor. The result of these considerations is to satisfy me that for the purposes of income tax the income of a foreign company and the income received from it in dividends by its British shareholders are not to any extent or effect one and the same income, but are

(1) 7 Q. B. D. 562; 1 Tax Cas. 501.

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two distinct incomes. The fact that the foreign company's total income is in part composed of British dividends which have borne tax by deduction is entirely irrelevant to the question of the tax to be paid by a British shareholder on the dividends received by him from the foreign company. There is no such identification of the British shareholder with the foreign company as there is between a British shareholder and a British company, and the attempted analogy is only misleading. The income of the foreign company and the income received in dividends from it by its British shareholder are in our revenue law the incomes of two different persons, and there can thus be no room for any invocation of the rule against double taxation, which applies only against taxing twice the same income of the same person. The principle of the decision in *Gilbertson v. Fergusson* (1) already undermined by *Barnes v. Hely Hutchinson* (2), is thus, if I am right, finally exploded. If it is relegated to the limbo of cases overruled, the whole basis of the arguments of the appellants in both these appeals goes with it. They should both, in my opinion, be dismissed.

LORD SIMONDS (read by LORD MACMILLAN). My Lords, this is an appeal by the Canadian Eagle Oil Co., Ltd., from an order of the Court of Appeal dismissing an appeal by the appellant from an order of Macnaghten J. whereby a petition of right presented by the appellant was on demurrer dismissed with costs and the demurrer allowed.

The relevant facts do not appear to be in dispute but it is necessary for your Lordships to consider in regard to them certain provisions of the law relating to income tax and certain cases which have been recently decided in this House. I do not hesitate to say at the outset that in my opinion your Lordships, having done so, must refuse to admit that the case of *Gilbertson v. Fergusson* (1), on which so much argument has turned, can any longer be regarded as a binding authority.

My Lords, I propose briefly to examine the claim of the appellant company in the light of the express provisions of income tax law before I turn to the case on which the appellant relies, and first I will refer to the provisions under which the appellant itself paid tax. Under sch. D of the Income Tax Act, 1918 (to which I refer as "the Act"), tax

(1) 7 Q. B. D. 562; 1 Tax Cas. 655. (2) [1940] A. C. 81; 22 Tax Cas. 501.

is chargeable "in respect of (a) the annual profits or gains arising or accruing (i.) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere . . . (iii.) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom; and (b) all interest of money, annuities, and other annual profits or gains not charged under sch. A, B, C or E and not specially exempted from tax."

Rule 1 of the General Rules applicable to sch. A, B, C, D and E provides that "every body of persons shall be chargeable to tax in like manner as any person is chargeable under the provisions of this Act," and r. 20 of the same rules provides that "the profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto." It may be noted in passing that the words "appropriate thereto" are by virtue of s. 39, sub-s. 1, of the Finance Act, 1927, to have effect as if they were "at the standard rate for the year in which the amount payable becomes due." Rules 19 and 21 of the same rules provide as a matter of right or of obligation for the deduction of tax from any yearly interest of money, annuity, or any other annual payment by the person making such payment. It is unnecessary to state these rules more fully. From these provisions it follows that the appellant in respect of its three sources of income to which I have referred paid tax, either by deduction under r. 20, or by deduction under r. 19 or r. 21, or by direct assessment and payment. Deduction, assessment and payment were alike unchallenged and unchallengeable.

Next I refer to the tax suffered by the shareholders in respect of their dividends. Under sch. D, Case V., tax is chargeable "in respect of income arising from possessions out of the United Kingdom." This tax is chargeable only upon persons resident in the United Kingdom. Dividends of the appellant are income arising from possessions out of the United Kingdom within this case. It follows that the shareholders of the appellant who are resident in the United

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Kingdom are chargeable to tax in respect of their dividends, and they would be directly assessable and chargeable but for the machinery provision to which I next refer. It is provided by r. 7 of the Miscellaneous Rules applicable to sch. D (which replaces and substantially reproduces s. 10 of the Income Tax Act, 1853) (1.) that "where any interest, dividends, or " other annual payments payable out of or in respect of the " stocks, funds, shares, or securities of any foreign or colonial " company . . . are entrusted to any person in the United " Kingdom for payment to any persons in the United Kingdom, " the same shall be assessed and charged to tax under this " schedule by the special commissioners," and (2.) "that all " the provisions of sch. C relating to the tax to be assessed " and charged in respect of dividends payable out of any " public revenue " (other than as therein mentioned) " and " entrusted to any person " (other than as therein mentioned) " for payment to any persons in the United Kingdom, shall " extend to the tax to be assessed and charged under this " rule." This takes me to the relevant rules under sch. C. (" Rules as to interest, etc. with the payment of which persons " other than the Bank of England, the Bank of Ireland and " the National Debt Commissioners are interested.") They need not be stated in detail. Rule 1 provides for the persons who are entrusted with the payment of the dividends therein mentioned delivering to the Commissioners of Inland Revenue certain accounts and particulars, r. 2 for the assessment and charge of the dividends by the Special Commissioners and for notice of the assessment and charge being given to the person entrusted with payment. Rule 3 provides that "the person " entrusted with payment shall out of the moneys in his hands " pay the tax on the dividends on behalf of the persons " entitled thereto, and shall be acquitted in respect of all " such payments, and the provisions of this Act shall apply " as in the case of dividends payable . . . out of the public " revenue of the United Kingdom." Rule 5 provides for remuneration by the Treasury of the person entrusted with payments who has thus in effect acted as a collector of taxes. It is perhaps worth referring to r. 7 of the rules as to interest payable out of the public revenue (referred to in r. 3 above) which provides that the retaining of this amount (i.e. of tax) out of interest, annuities, or dividends by the Bank of England shall be deemed a payment of the tax by the persons entitled to such interest, annuities or dividends. This rein-

forces, what is already sufficiently clear, that the payment of tax by the persons entrusted with the payment of dividends is a payment on behalf of the shareholder. It is a matter with which the foreign company paying the dividend has nothing whatever to do. Whether it pays its dividend direct to its shareholders or to paying agents for distribution to its shareholders, it fades from the fiscal scene as soon as the payments are made : more accurately, it has never come on to the stage at all except so far as its own income may, directly or by deduction, have suffered British income tax.

Here then are the simple facts. The appellant has under Cases I. and III. of sch. D paid tax on some part of its income : it has distributed dividends to its shareholders of whom some are resident in the United Kingdom : in respect of such dividends tax has been paid by such shareholders under Case V. of sch. D : some part of such dividends is attributable to income upon which tax has been paid by the appellant under Cases I. and III. : therefore the appellant maintains that it is entitled to be repaid a proportionate part of the tax which it has paid. This claim, my Lords, is not based on any express provision of the Act. Indeed, as may be plainly seen from my recital of the relevant provisions, it gets no support from them. It is founded on the authority of *Gilbertson v. Fergusson* (1) which was decided over sixty years ago, upon a long course of practice by the Revenue authorities, and upon an alleged overriding principle of revenue law, which (whatever the statute appears to say) precludes the same income in the same hands being taxed twice over and for this purpose identifies as the same hands the hands of a company and its shareholders. I must first deal with *Gilbertson v. Fergusson* (1). I respectfully concur in the view of the Court of Appeal in the present case that it was not open to them to treat the case as overruled, though I should have shared their difficulty in determining how much of it was left standing. I must concur also in the view expressed by Lord Atkin in *Barnes v. Hely Hutchinson* (2), that this House will hesitate long before overruling a case which has stood for so long. But, if I find that it is based on a line of reasoning which is not really consistent with the law as laid down in this House I must conclude that it ought to be expressly overruled. The relevant facts in *Gilbertson's* case (1) were these. The

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(1) 7 Q. B. D. 562 ; 1 Tax Cas.
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(2) [1940] A. C. 81, 89 ; 22 Tax
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Imperial Ottoman Bank, a foreign corporation, not resident in the United Kingdom, carried on business and earned profits outside the United Kingdom. It also had an agency in London which there carried on a branch of its business. The dividends of the bank were payable at the option of its shareholders either abroad or by the London agency in London. In a particular year the profits earned by the business carried on in London by the London agency sufficed to enable the agency to pay all the dividends payable in London without recourse to the bank's profits which were made abroad or to funds held abroad. The London agency was assessed to tax under Case I. of sch. D of the Income Tax Act, 1842, in respect of the profits earned by the bank in the United Kingdom. The validity of this assessment could not be and was not challenged. Then, however, on payment of the dividends payable in London (which was entrusted to the London agency) two further assessments were made on the agency, which were contested by Gilbertson as its representative. One of them was held to be invalid and need not be examined. The other was on the London agency as the person entrusted with the payment of the dividend of a foreign corporation under s. 10 of the Income Tax Act, 1853 (the precursor of the present r. 7 of the Miscellaneous Rules). On this it was held that under the cited section the London agency was liable to be assessed in respect of the dividends paid in the United Kingdom, but that since those dividends were payable out of the general income of the bank, which consisted of profits made partly in the United Kingdom and partly elsewhere, and the London agency had been assessed to tax under Case I. of sch. D on the profits earned in the United Kingdom, the agency ought to be assessed under s. 10 of the Income Tax Act, 1853, only on so much of the dividends as were not paid out of the profits arising in the United Kingdom which had themselves been taxed under Case I. Two things in this case deserve attention : first, that the agency had a dual capacity ; it was through it that the bank carried on its London business, and it was to it that payment of the dividends was entrusted ; it was in the latter capacity that it was assessed and challenged the assessment under s. 10 of the Act of 1853 ; secondly, that it would appear from the argument of counsel that the principle of the relief to which the agency was held to be entitled was conceded by the Crown. It is, I think clear that, the challenged assessment being under s. 10 of the

Act of 1853 and being therefore an assessment on the agency on behalf of the shareholders, it could only be on their behalf that the assessment was challenged. So far then as the case is to be regarded as an authority, it decides that in such circumstances the shareholders are entitled to relief and gives no support to the claim of the appellant that a foreign company which has been properly assessed under sch. D, Cases I. and III., is entitled to relief because certain of its shareholders are assessed to tax under sch. D, Case V. This is alone sufficient to dispose of the appellant's claim so far as it rests on *Gilbertson's* case (1). But, my Lords, as there is another case before the House, in which a similar claim is made by or on behalf of a shareholder, it is desirable to deal more fully with the matter. To me it seems that the decision in *Gilbertson's* case (1) is fundamentally wrong. As Lord Atkin said of the case in *Barnes v. Hely Hutchinson* (2): "It seems to me plain that the reasoning proceeded on the theory then prevailing that the company paid tax on its profits on behalf of its shareholders." The same learned Lord had already said in *Cull v. Inland Revenue Commissioners* (3): "It is now clearly established that in the case of a limited company the company itself is chargeable to tax on its profits, and that it pays tax in discharge of its own liability and not as agent for its shareholders. The latter are not chargeable with income tax on dividends and they are not assessed in respect of them. The reason presumably is that the amount which is available to be distributed as dividend has already been diminished by tax on the company and it is thought to be inequitable to charge it again. At one time it was thought that the company in paying tax paid on behalf of the shareholder: but this theory is now exploded by decisions of this House: and the position of the shareholders as to tax is as I have stated it." Similar statements in this House might be multiplied. I would take, however, Lord Atkin's exposition of the relation between a company and its shareholders in regard to tax and apply it to, and contrast it with, the facts of the present case. It must be true of a foreign company as of an English one that the company does not pay tax on behalf of its shareholders.

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(1) 7 Q. B. D. 562; 1 Tax Cas. 501.

(3) [1940] A. C. 51, 56; 22 Tax Cas. 603, 636.

(2) [1940] A. C. 81, 89; 22 Tax Cas. 655, 672.

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But when Lord Atkin said that the shareholder in a limited company is not taxed in respect of his dividend, he was dealing with an English company, and cannot be read as referring to a foreign company, for no one doubts that a dividend from a foreign company is taxable as "income from foreign possessions" and that a shareholder in a foreign company does pay tax upon his dividend. The shareholder in an English company is not taxed upon his dividend, but he goes untaxed because on the true construction of the Income Tax Act no tax is imposed on his dividend. He does not escape tax because some overriding principle says that he shall not be taxed. As Rowlatt J. said in *Purdie v. The King* (1). "There is, strictly speaking, no tax upon dividends at all," cited with approval by Lord Tomlin in *Neumann v. Inland Revenue Commissioners* (2). But in the case of the foreign company's dividend the Act imposes tax in unambiguous terms. It is impossible to escape it by reference to some overriding principle. These difficulties were I think present to the mind of the House in the recent case of *Barnes v. Hely Hutchinson* (3). There the claim for relief was by a shareholder, but it was possible inasmuch as it was by a preference shareholder who had received his preference dividend in full, to reject it without formally overruling *Gilbertson's* case (4). But the decision appears to me to be wholly inconsistent with the principle on which *Gilbertson's* case (4) was decided. For if there is an identity between a foreign company and its shareholders which requires that, if the company has paid tax on its income, the shareholder should not pay tax on so much of his dividend as is attributable to that income, there can be no ground for saying that this is to apply to one class of shareholder but not to another. I would indeed be inclined to regard the claim in *Barnes v. Hely Hutchinson* (3) as the reductio ad absurdum of the decision in *Gilbertson's* case (4) and the opinion of this House as an exposition of its falsity.

It was urged by counsel for the appellant that even if the reasoning in *Gilbertson's* case (4) must be regarded as demonstrably wrong in the light of the decisions of this House, yet the actual decision could be supported on other grounds

(1) [1914] 3 K. B. 112, 116.

(4) 7 Q. B. D. 562; 1 Tax Cas.

(2) [1934] A. C. 215, 228.

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(3) [1940] A. C. 81; 22 Tax Cas.

equally applicable to the present appeal. This argument is primarily founded on r. 20 of the General Rules which was originally enacted as s. 54 of the Act of 1842. I have already cited and need not repeat it. It is argued that the rule has five purposes (1.) it recognizes and affirms the principle that a dividend paid by a body corporate to a shareholder therein is not a new income separate from the income of the body corporate but is a part of such latter income, the ownership of which is, on the declaration and payment of a dividend, transferred from the body corporate to the shareholder, (2.) it provides machinery for taxing the dividend received by such shareholder at its source, (3.) it ensures that where the shareholder receives part of the income of the body corporate, the burden of the tax attributable to that part falls on him unless the body corporate does not exercise its right of deduction, (4.) it ensures that the Crown does not receive tax more than once on the income of the body corporate whether such income is distributed or not, and (5.) it affirms the principle that a shareholder cannot himself be assessed to tax on his dividend if it is one from which deduction of tax is authorized by the rule. I have set out this argument at such length in deference to the care and elaboration with which it was presented. But it may be answered very shortly. I will for this purpose assume, though I am far from accepting, that r. 20 applies to a foreign company. If so, let the foreign company take advantage of it. But I am unable to see how there can be given to this rule, which is after all a rule and nothing more, the substantive effect for which the appellant contends. His contention involves nothing less than this, that there must be read into the statute, presumably as a proviso to sch. D, a provision that where a foreign company has paid tax under Case I. of sch. D and at a later date (it does not matter how much later) its shareholders are taxed in respect of dividends under Case V. of the same schedule, then, if some part of the dividends is attributable to profits which have borne tax under Case I., the company is entitled to be repaid a proportionate part of the tax. There can in my opinion be no possible justification for such an interpolation. It is, I think, true that in the result the treatment meted out to English and foreign companies and their respective shareholders may not be the same. But I see no reason why this should not be so. It was I think justly observed by Lord Phillimore in *Bradbury v. English Sewing Cotton Co., Ltd.* (1) in regard to

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(1) [1923] A. C. 744, 770; 8 Tax Cas. 481, 519.

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income from foreign possessions " the officers of the Crown do " not know and do not care what is the character of the " sources from which the money comes." Even if income tax law could be regarded as one logical and consistent whole, there appears to be good reason for differentiation between the two kinds of companies. But reason or no reason, the provisions of the Act are clear.

It is convenient now to deal shortly with the practice of the revenue authorities since *Gilbertson's* case (1) and particularly in regard to the appellant since its incorporation in 1928. There appears to be no doubt that the Revenue authorities rightly or wrongly for long treated the decision in *Gilbertson's* case (1) as requiring or justifying the granting of such relief to a foreign company as the appellant now claims. Accordingly in the year 1929 (for which year the appellant paid dividends only on its cumulative first preference shares) repayment was made to the appellant of a substantial sum in respect of the tax which had been paid by the bank under r. 7, this sum being ascertained by means of an agreed formula with which I need not trouble your Lordships. In the year 1930 a similar course was followed. In the year 1931 the appellant paid dividends on all three classes of its shares and similar relief was given to the appellant in respect of the tax paid on all such dividends. In the year 1932 a change was made, for in that year the Revenue authorities declined to grant relief in respect of the tax paid on the dividends on the two classes of preference shares, the ground of their refusal being that they were advised that no relief was allowable in the case of dividends paid at a fixed rate. I see no logic in this, for it was the company that claimed relief on the ground that the same income was being taxed twice, first in its hands and then in the hands of its shareholders and it must be irrelevant what were the rights of the shareholders either inter se or in relation to the company. However the Revenue authorities maintained their position and the appellant did not contest it. In the years 1933, 1935 and 1936 the appellant paid no dividends at all. In the year 1934 it paid dividends only on its preference shares. In the years ended April 5, 1937, 1938 and 1939, the appellant paid dividends on all three classes of its shares and in these years relief was claimed and allowed in respect of the dividends on the ordinary shares only. For the year ended April 5, 1940, a new attitude was adopted by the Revenue

[1] 7 Q. B. D. 562; 1 Tax Cas. 501.

authorities. In that year the appellant again paid dividends on all three classes of shares, but on claiming relief in respect of tax paid on the ordinary share dividend was told by the Revenue authorities that it could only be granted in respect of so much of the tax as was attributable to that part of its income arising in the United Kingdom which had been the subject of direct assessment, i.e. the interest paid by banks in England with whom money had been deposited. This refusal led to the whole issue being raised which has eventually reached this House. For the appellant thereupon presented its petition of right praying for relief in respect of the tax on the dividends of all three classes of shares, and the Crown, though at first willing to concede the much diminished relief to which I have referred, at the last has objected that no relief of any kind should be given.

On these facts the appellant argued that, whatever opinion your Lordships might form upon the merits of the case if the matter were *res integra*, it was too late to disturb a decision given sixty years ago and so long honoured by the Crown, particularly in a matter of revenue where there is in each year an opportunity for review. There would be great weight in this contention but for the fact that, as I have already pointed out, the ratio decidendi of *Gilbertson's* case (1) is inconsistent with later decisions of this House. I see no way of maintaining the earlier decision. If this House were to do so, it would assert the validity of two contradictory views of the relation of a company and its shareholders in regard to the payment of dividends. That is a course which your Lordships will, I think, decline to take. In my opinion *Gilbertson's* case (1) must be overruled without any qualification or distinction either in regard to the different sources of the foreign company's income arising in the United Kingdom or in regard to the quality of the shares held by shareholders in the United Kingdom to whom it pays dividends.

I would make one further observation on the merits of the claim. It has been found possible in the past, when the principle of relief was accorded, to agree the proportion of dividend attributable to the company's income arising in the United Kingdom. And since it has been found possible, I cannot say that it is impossible. But I do say that such an attribution must involve an examination of accounts, which in the case of a foreign company might well present great

(1) 7 Q. B. D. 562; 1 Tax Cas. 501.

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difficulties and at the best result in a conventional and arbitrary figure. The constituents of the fund out of which a dividend is paid, made up perhaps of profits earned in the year in question, of a carry over from previous years, of recourse perhaps to a dividend equalization fund, really defy analysis; it is a satisfactory result of your Lordships' decision that such an investigation will not be necessary. Finally, I would say on the question of procedure which is no longer relevant that it appears to me that the appellant had no other remedy than to proceed by petition of right.

My Lords, the appeal of Selection Trust, Ltd., raises substantially the same question as that which your Lordships have just determined on the appeal of the Canadian Eagle Oil Co., Ltd. The differences are these: (1.) the appellant who claims relief is a holder of ordinary shares in a foreign company not the foreign company itself, and (2.) the foreign company paid its dividends direct to its shareholders in the United Kingdom, who were therefore directly assessable in respect of such dividends as income arising from foreign possessions under Case V. of sch. D of the Income Tax Act, 1918. It differs only from the case of *Barnes v. Hely Hutchinson* (1) in that there the claimant was a holder of preference shares carrying a fixed rate of dividend, here he is a holder of ordinary shares. He relies on the authority of *Gilbertson v. Fergusson* (2), as did the claimants in the cases cited. I have already given my reasons for thinking that case was wrongly decided and should be overruled and will not repeat them. I concur in the motion that this appeal should be dismissed.

Appeals dismissed.

Solicitor for Canadian Eagle Oil Co., Ltd.: *Horace Davey.*

Solicitors for Selection Trust Ltd.: *Freshfields, Leese & Munns.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

(1) [1940] A. C. 81; 22 Tax Cas. 655.

(2) 7 Q. B. D. 562; 1 Tax Cas. 501.

[HOUSE OF LORDS.]

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AND

July 24, 25,
26 ; Nov 2.BRISTOL AEROPLANE COMPANY
LIMITED RESPONDENTS.

*Workmen's compensation—Injury to workman—Alternative remedies—
Receipt of compensation—Claim to recover damages at common law
—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84),
s. 29, sub-s. 1.*

By s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925 :
 " When the injury was caused by the personal negligence or wilful
 " act of the employer or of some person for whose act or default
 " the employer is responsible, nothing in this Act shall affect any
 " civil liability of the employer, but in that case the workman may,
 " at his option, either claim compensation under this Act or take
 " proceedings independently of this Act ; but the employer shall
 " not be liable to pay compensation for injury to a workman
 " by accident arising out of and in the course of the employment
 " both independently of and also under this Act, and shall not be
 " liable to any proceedings independently of this Act, except in
 " case of such personal negligence or wilful act as aforesaid."

On April 3, 1942, the appellant was injured at work while in the respondents' employment. On April 30, he attended at their works and was paid a sum equal to the compensation due under the Workmen's Compensation Act, 1925, in respect of four weeks. Thereafter, until October, when he returned to work, he was paid 1*l.* 15*s.* *od.* a week at the works and on each occasion he was shown a pay-sheet indicating that the payments were made under the Act. On July 24 his solicitor wrote to the respondents claiming compensation under the Act and alternatively damages on the ground that the machine which had injured him was not guarded, and in February, 1943, he commenced an action for damages at common law :—

Held, that however difficult it might be to determine what steps taken by the workman must be held in law to be evidence of an irrevocable exercise of his statutory option (on which point their Lordships expressed different opinions) that " option," in s. 29, is not equivalent to equitable election, and as the appellant having become aware in July, 1942, of the choice given to him by the sub-section, had with that knowledge chosen to continue in receipt of compensation until he returned to work, and so enforced in full the liability of the employer to pay compensation under the

* *Present* : VISCOUNT SIMON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD PORTER and LORD SIMONDS.

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Act, he had irrevocably exercised his statutory option and was debarred from taking proceedings independently of the Act.

Perkins v. Hugh Stevenson & Sons, Ltd. [1940] 1 K.B. 56;
Selwood v. Townley Coal & Fireclay Coal, Ltd. [1940] 1 K.B. 189,
and *Brown v. William Hamilton & Co.*, 1944 S.L.T. 282;
37 B. W. C. C. Supp. 52 discussed.

Per Viscount Simon, approving the decision of the Court of Appeal on this point: A decision of a division of the Court of Appeal is authority binding on the full Court of Appeal in a later case.

Decision of the Court of Appeal [1944] K. B. 718 affirmed.

APPEAL from the Court of Appeal.

The facts, stated by VISCOUNT SIMON and LORD PORTER, were as follows: On April 3, 1942, the appellant lost three fingers of his left hand by amputation, while operating a guillotine sheet-metal cutter in the respondents' factory. It was not disputed that this accident arose out of and in the course of his employment in such circumstances as to create a liability in the respondents to pay compensation for his injury under s. 1 of the Workmen's Compensation Act, 1925. About three weeks after the accident he saw at the respondents' works one Howarth, assistant to their commercial manager. Howarth's duty was to deal with payments under the Act and he saw about fifteen to twenty men on days specially appointed for that purpose. He told the appellant that no authority had yet come from the respondents' insurance company to make any payment and asked him whether, in view of the seriousness of his injury, he would seek advice, and probably mentioned his trade union. The appellant next visited Howarth at the respondents' works on April 30 and on that occasion Howarth passed over the pay sheet for him to read and explained that that although only twenty-four days' compensation was then due, he proposed to pay up to the end of the fourth week. The appellant read and understood the form, which plainly showed that it dealt with weekly payments under the Workmen's Compensation Acts. He then filled in the form and signed the appropriate receipt, receiving 6*l.* 15*s.* 0*d.* At that time he had not yet taken legal advice. Thereafter he attended at the works and was paid by Howarth, week after week, the sum of 1*l.* 15*s.* 0*d.* until he returned to work on October 2. No notice was given or assertion made that the receipt was without prejudice to the bringing of a claim for damages. Meanwhile, on July 24, the appellant's solicitor wrote to the respondents: "I understand that your

"firm was prosecuted for not having a machine guarded, and
 "I desire to claim compensation under the Workmen's
 "Compensation Act, and alternatively, I desire to claim
 "damages." On August 4, the respondents' solicitors wrote
 to the appellant's solicitors that the matter had been passed
 on to their insurance company. On August 19 the insurance
 company wrote: "We would state that liability is only
 "admitted under the Workmen's Compensation Act and your
 "client has been in receipt of compensation under the statute
 "since his cessation following the injuries." After some
 further communications between the parties a writ was
 issued on behalf of the appellant on February 5, 1943, claiming
 damages for negligence and breach of statutory duty. The
 substantial defences to the action were (1.) that the appellant
 had been guilty of contributory negligence, and (2.) that, in
 any event, having claimed and received compensation under
 the Workmen's Compensation Act, 1925, he was debarred
 from recovering damages. At the Manchester Assizes, at
 which the case was tried, Mr. Commissioner Laski K.C.
 negatived the first defence but held that the second must
 succeed. He said: "I am satisfied . . . that the [appellant]
 "did not claim for compensation 'as such' The
 "[appellant], as I find, received the payments made to him
 "as compensation under the Workmen's Compensation Act
 "and the payments were paid to him as such. I also find that
 "at the time the [appellant] received his first payment on
 "April 30, 1942, and until such time as he consulted his
 "solicitor (the date was not fixed with any precision, but was
 "clearly shortly prior to the letter of July 24, 1942), he
 "did not know that he had a right under s. 29, sub-s. 1, of
 "the Workmen's Compensation Act, to elect as between two
 "alternative remedies. It follows that the [appellant], not
 "knowing of the existence of his right to elect, could not be
 "said to have exercised the option given to him by the sub-
 "section." He held himself bound by *Perkins v. Hugh
 Stevenson & Sons, Ltd.* (1) and *Selwood v. Townley Coal &
 Fireclay Co., Ltd.* (2) to give judgment for the respondents.
 The Court of Appeal (Lord Greene M.R., Scott, MacKinnon,
 Luxmoore, Goddard and du Parc L.J.J.) was specially
 constituted to hear the appellant's appeal, which was
 dismissed. The appellant appealed to the House of
 Lords.

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(1) [1940] 1 K. B. 56.

(2) [1940] 1 K. B. 180.

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Paull K.C. and *H. Burton* for the appellant. The appellant did not exercise an "option" within the provisions of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, and was not committed irrevocably to his claim under the Act, for unless it can be found that the workman has exercised an option, the second half of the sub-section does not arise. The appellant's choice remained alive. The second part of sub-s. 1 is not an independent and separate provision but, on the contrary, is exegetical or explanatory of the first, meaning that the workman may at his option pursue either remedy, provided that by so doing he does not ultimately impose a liability on his employer to pay both damages and compensation: see *Avery v. London and North Eastern Ry. Co.* (1); *London Brick Co., Ltd. v. Robinson* (2), and *Kinneil Cannel & Coking Coal Co., Ltd. v. Waddell* (3). These three authorities crystallize the legal position. The point of imposing a double liability on the employer is not reached unless either a judgment has been obtained in the workman's favour in a claim for damages or an award has been made in his favour or an agreement or compensation registered: see *Rouse v. Dixon* (4) and *Edwards v. Godfrey* (5). The words "shall not be liable to pay" do not cover the case of a mere payment of a weekly sum by the employer as workmen's compensation accepted by the employee as such. Such a payment does not necessarily import a liability to go on paying: *Nomeracsky v. Canterbury Dressing Works* (6). The words must not be read as though they were "shall not pay." The liability arises not at the time of the accident but at the time of the order of the court: see s. 23 of the Act. The matter depends on the precise meaning of the words "claim compensation." The object of the sub-section is to protect the employer from being proceeded against more than once, not to protect him only from being made to pay more than once. In this case there had been no proceedings at all under the Workmen's Compensation Act and in such a case there can be no irrevocable exercise of the option on the part of the workman. In giving the workman an "option" between two courses the Act has put him to his "election" in a sense analogous to the use of the word in equity. Such an election can only be made where the workman knows of the alternatives and has

(1) [1938] A. C. 606.

(2) [1943] A. C. 341.

(3) [1931] A. C. 575, 588.

(4) [1904] 2 K. B. 628, 632, 634.

(5) [1899] 2 Q. B. 333.

(6) (1928) 21 B. W. C. C. 41.

full information of the advantages and disadvantages of adopting one or the other: see *Coe v. London and North Eastern Ry. Co.* (1). Any other construction gives no meaning to the words "at his option." The decisions in *Perkins v. Hugh Stevenson & Sons, Ltd.* (2) and *Selwood v. Townley Coal & Fireclay Co., Ltd.* (3) were wrong. They cannot stand with *Kinneil Cannel & Coking Coal Co., Ltd.* (4) and *Perkins' case* (2) is not consistent with *Stimpson v. Standard Telephones & Cables, Ltd.* (5). [They referred to *Powell v. Main Colliery Co., Ltd.* (6); *Cribb v. Kynoch, Ltd.* (No. 1) (7); *Harrison v. Wythemoor Colliery Co., Ltd.* (8); *King v. Edinburgh Collieries Co., Ltd.* (9); *Bennett v. L. & W. Whitehead, Ltd.* (10); *Unsworth v. Elder Dempster Lines, Ltd.* (11) and *Brown v. William Hamilton & Co.* (12), and to the Workmen's Compensation Act, 1925, ss. 3 and 14.]

Sellers K.C. and *Matabele Davies* for the respondents. The appellant accepted from the respondents payments of compensation under the Workmen's Compensation Act, 1925. By virtue of s. 29, sub-s. 1, of the Act, such a payment and receipt bars the recovery of damages at common law by the same person "independently of the Act." The acceptance either of damages or of compensation as such is a bar to recovery under the alternative remedy. The sub-section protects the employer from being made to pay more than once. Its two halves must be read separately. Claiming compensation means asking for it, and the appellant did inferentially "claim compensation" under the Act. If one puts one's foot on a shoeblack's box without expressly asking for a shine, one is taken to have asked for it inferentially. The whole Act is intended to be informal and to work without there necessarily being any proceedings. There is no arbitration unless a question arises, e.g., if compensation has been claimed and refused in whole or in part. The commencement of legal proceedings is not necessarily contemplated by the sub-section: *Powell v. Main Colliery Co., Ltd.* (13); *Bennett v. L. & W. Whitehead, Ltd.* (14) and *Page v. Burtwell* (15): see also s. 21 of the Act, and r. 8 of the Workmen's Compensation

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(1) [1943] 2 K. B. 531.

(2) [1940] 1 K. B. 56.

(3) [1940] 1 K. B. 180.

(4) [1931] A. C. 575.

(5) [1940] 1 K. B. 342, 353.

(6) [1900] A. C. 366.

(7) [1908] 2 K. B. 551, 554.

(8) [1922] 2 K. B. 674, 686.

(9) 1924 S. C. 167, 171, 172.

(10) [1926] 2 K. B. 380, 405.

(11) [1940] 1 K. B. 658, 671, 672.

(12) 1944 S. L. T. 282;

37 B. W. C. C. Supp. 52.

(13) [1900] A. C. 366, 371.

(14) [1926] 2 K. B. 380, 387.

(15) [1908] 2 K. B. 758.

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Rules, 1926. In accepting these payments under the Act the appellant deliberately took one course, exercising his "option" irrevocably, and he cannot now go back on it. There must be imputed to the ordinary man a knowledge of his legal rights and it is erroneous to say that some special knowledge must be brought home to the appellant. It is enough that he should simply have knowledge that he has a right to choose. What was in his mind is immaterial; the relevant thing is what he did. The matter does not turn on the exercise of an option in the sense of an equitable election, though, on any interpretation, there has here been, on the facts, a concluded election. [They referred to *Little v. P. & W. MacLellan, Ltd.* (1); *Burton v. Chapel Coal Co., Ltd.* (2); *Mackay v. Rosie* (3); *Guest, Keen & Nettlefolds, Ltd. v. Williams* (4); *Lewis v. Cammel Laird & Co., Ltd.* (5) and *Birch v. Pease & Partners* (6).]

Paull K.C. in reply. Acceptance of a payment under the Act is not conclusive evidence that the workman has chosen to proceed under it, but if the respondents' contention is right even one payment would bar his claim to damages, though made to him personally by his employer while he was still in hospital. The Act gives him the right to get the remedy that he chooses and while his solicitor is still finding out the facts of the case he cannot be taken to have exercised his option. All the circumstances must be considered in deciding on the evidence whether he has made a choice. [He referred to *Kinneil Cannel & Coking Coal Co., Ltd. v. Waddell* (7) and *Bennett v. L. & W. Whitehead, Ltd.* (8).]

The House took time for consideration.

Nov. 29. VISCOUNT SIMON. My Lords, this is the appeal of the plaintiff, in an action brought for damages at common law against his employers, the respondents, for failure to fence dangerous machinery. The appeal is from a unanimous decision of the Court of Appeal. That court was specially constituted to hear the appellant's appeal from the judgment given against him by Mr. Commissioner Laski K.C., at Manchester Assizes. Besides Lord Greene M.R., who delivered

(1) 1900 2 F. 387, 389.

(2) 1909 S. C. 430; 2 B. W. C. C. 120.

(3) 1908 S. C. 174; 1 B. W. C. C. 52.

(4) (1925) 18 B. W. C. C. 68.

(5) (1929) 22 B. W. C. C. 410.

(6) [1941] 1 K. B. 615, 623.

(7) [1931] A. C. 575, 584.

(8) [1926] 2 K. B. 380, 405.

the considered judgment of the whole court, Scott, MacKinnon, Luxmoore, Goddard and du Parc L.JJ. were parties to the decision. One of the conclusions reached in the judgment of the Master of the Rolls, with which I agree, is that if the Court of Appeal, when sitting in one of its divisions, has in a previous case pronounced on a point of law which necessarily covers a later case coming before the court, the previous decision must be followed (unless, of course, it was given per incuriam, or unless the House of Lords has in the meantime decided that the law is otherwise), and that this application of the rules governing the use of precedents binds the full Court of Appeal no less than a division of the court as usually constituted. Thus, the previous decisions of the Court of Appeal in *Perkins v. Hugh Stevenson & Sons, Ltd.* (1) and *Selwood v. Townley Coal & Fireclay Co., Ltd.* (2), upon the correctness of which the respondents rely, but which the appellant challenges, could not be overruled in that court; and since these decisions were held to apply to the present case in a sense adverse to the appellant, his appeal was necessarily dismissed.

The present appeal, therefore, is in substance a submission that the decisions in *Perkins'* case (1) and *Selwood's* case (2) are wrong, or at any rate that they are not conclusive against the appellant's claim. The question involves the interpretation and application of s. 29, sub-s. 1, of the Workmen's Compensation Act—a section which is in the same form as s. 1, sub-s. 2 (a) of the original Act of 1896 and one which has given rise to many difficulties and to a multitude of decisions. [His Lordship read the sub-section and continued:]

In *Perkins'* case (1), the injured workman had actually applied to his employers for compensation under the Act and was paid weekly sums accordingly for about a year, after which no further compensation was due as he had recovered from his injuries. About two months after the accident, however, his solicitor had written referring to his alternative claim apart from the Act and attempted unsuccessfully to secure that the weekly payments should be regarded as being made without prejudice to the alternative claim. The Court of Appeal held that this alternative claim was barred, because from the date of the solicitor's letter the workman must be regarded as having material for exercising his "option" and as having exercised it; the employer had already been made liable under the Act and had paid in full all that the Act

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prescribed and could not, therefore, be also liable independently of the Act. It is true that in the course of his judgment the Master of the Rolls expressed the view (1) that "where the employer, in response to a claim under the Act, has made a payment of compensation under the Act, that payment discharges once and for ever, in whole or pro tanto, the statutory liability under the Act," and Finlay L.J. appears to agree with him. But this view is not essential to the decision, and the Master of the Rolls goes on to point out that in that case the workman had in fact exercised his option. The actual decision can be supported by reason of that circumstance, apart from the fact that the workman had claimed and received compensation without knowledge that another remedy was available to him if he chose to adopt it. In *Selwood's* case (2), the workman had made no application for compensation but he had received a number of weekly sums from his employers which were, as he knew, payments under the Act. Later, and while still gravely incapacitated, he refused, on the advice of his solicitor, to accept any more weekly payments and subsequently brought an action at common law against his employers for damages for personal injuries. The Court of Appeal held that the principle of *Perkins'* case (1) applied; he could not succeed in his action, according to the Court of Appeal, because, if he did, his employers would be paying both under the Act and independently of the Act. One difficulty I feel about this latter decision is that it involves the conclusion that if an injured workman receives one single weekly payment, knowing it is tendered as compensation under the Act, he loses all chance of suing successfully at common law. On this view, he takes the first payment, even though he has never asked for it, at his peril. The employers have paid for one week "under this Act," and are liable to pay it, and therefore, it is suggested, they cannot thenceforth be liable to any proceedings by the workman "independently of this Act." It is to be observed that in *Selwood's* case (2) there is no trace of a suggestion that the workman had effectively exercised an "option." The decision turned on nothing else than that one or more weekly payments had been offered and accepted. Having regard to the general scheme of the Act and to its obvious purpose of preserving remedies apart from the Act if the

(1) [1940] 1 K. B. 56, 66.

(2) [1940] 1 K. B. 180.

workman chose to avail himself of the alternative, I cannot accept this view. *Perkins'* case (1), on its actual facts, seems to me to be correctly decided: there the workman, by persisting in receiving weekly compensation as long as his injury lasted, although he long before had appreciated that the law offered him an alternative remedy, must be regarded as having effectively exercised "his option." But, with all respect to the members of the Court of Appeal in *Selwood's* case (2), which was decided three months later, I do not agree that this decision necessarily followed from the principle laid down in *Perkins'* case (1), and I think that the decision in *Selwood's* case (2) was wrong. Lord Patrick in *Brown v. William Hamilton & Co.* (3) develops the view which I would uphold with much clearness and cogency. I think that the Scotch authorities quoted by Lord Patrick (4) are right in treating the final part of s. 29 ("but the employer," etc.), as exegetical of the preceding part ("but in that case the "workman may, at his option," etc.), and not as further restricting by an added condition the workman's right of option. As Lord Patrick points out, and as was also laid down by the present Lord Goddard in the Court of Appeal in *Unsworth v. Elder Dempster Lines, Ltd.* (5), no difficulty in adopting this construction arises from the rule that the employer is not to be bound to pay twice over. If, before the workman can be regarded as having really exercised his option, he receives one or more weekly payments under the Act, and he then opts to issue a writ and recovers damages, the damages in the action would be reduced by the amounts already received. This view secures what Lord Greene M.R. in *Perkins'* case (6), described as the effect of the final words, namely, that "the employer is not to be made to pay twice "over to the same person." I cannot agree that the deduction from damages of a sum already paid in respect of the same injury is contrary to any "principle of law" (7). On the contrary, I would adopt Lord Patrick's statement that "when "the workman sues at common law, if the sum awarded in "name of damages exceeds the sums already paid to him in "name of workmen's compensation, these sums will form

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(2) [1940] 1 K. B. 180.

(3) 1944 S. L. T. 282, 286;

37 B. W. C. C. Supp. 52, 63, 84.

(4) 1944 S. L. T. 282, 285;

37 B. W. C. C. Supp. 52, 60.

(5) [1940] 1 K. B. 658, 674.

(6) [1940] 1 K. B. 56, 65.

(7) Ibid. 67.

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"a good set-off or will have to be taken into account in "diminution of damages" (1). In the present case, I agree that the appeal must be dismissed on the ground that the appellant, who knew of his "option" in July, nevertheless continued to draw weekly compensation till the following October, and must consequently have deliberately and consciously chosen to claim compensation under the Act, instead of proceeding independently of the Act.

As the House has heard a full discussion of the difficulties of construction arising under s. 29, I venture to add the following observations as representing my view of the general effect of the clause: 1. The statutory provisions for workmen's compensation are not to be understood as substituted for remedies against his employer previously available to the workman injured by the personal negligence or wilful act of the employer or of those for whom the employer is responsible. (One of the remedies so preserved is a right of action based upon breach of a statutory duty: *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (2); see especially per Lord Atkin.) The previous remedies remain available as an alternative for the cases which they cover. 2. But the two remedies are not to be pursued together. For a workman to issue a writ for damages independently of the Act and also to "claim" compensation under the Act is forbidden. This prohibition of double process applies to the initiation and carrying on of proceedings whether either or both of them would ultimately succeed or not. It is presumably inserted for the protection of the employer, so that he shall not be vexed with both demands concurrently. The protection so given him could in proper cases be secured by stay or injunction. 3. There thus being an option between two kinds of proceedings, who is to have the right to exercise the option? The employer cannot insist on being called on to pay by one process rather than by the other. It is the workman who opts. It is "his" option. This option is not equivalent to equitable election and I deprecate the use of the latter word as a substitute for the word in the section. If "election," in the full sense, were meant, it would be necessary for the workman to know all that was material to determine his choice. Scott L.J. is perfectly logical, in *Coe v. London and North Eastern Ry. Co.* (3), in saying that if "option" means "election" there

(1) 1944 S. L. T. 282, 286; (2) [1934] A. C. 1, 9.
37 B. W. C. C. Supp. 52, 64.

(3) [1943] K. B. 531, 540.

can be no effective exercise of option "without full knowledge of all material facts affecting his choice." But this, in my opinion, is not the meaning of "option" in this connexion. "Election" has two meanings, as Viscount Maugham pointed out in *Lissenden v. C.A.V. Bosch, Ltd.* (1) when he said: "The equitable doctrine of election has no connexion with the common law principle which puts a man to his election (to give a few instances only) whether he will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive a tort and claim as in contract, or whether in a case of wrongful conversion he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a court of justice. The history of the common law rules, the principles that apply to them, and the effect of the election are all very different from those which prevail where the equitable principle is in question." See also Lord Atkin's speech (2). Here we are dealing with a statutory "option," in its setting in the section, and I am willing to adopt the view, which has constantly been expressed and enforced, that the workman does not lose his alternative remedy merely because he accepts some payments under the Act, when the option is unknown to him. But if the circumstances amount to this, that he persists in taking weekly compensation after knowing of the alternative course, he is debarred from changing the nature of his claim. This view, in my opinion, is confirmed by the exegetical character of the prohibition against double liability. In conclusion, I would venture to express the hope that, if there is to be new statutory enactment on the subject of alternative remedies when workmen meet with industrial accident, the legislation will be so framed as to get rid of the doubts and difficulties which have led to so much controversy, and have given rise to such fine distinctions, in the interpretation and application of s. 29. My Lords, I move that the appeal be dismissed with costs.

LORD RUSSELL OF KILLOWEN (read by LORD PORTER). My Lords, the question debated on this appeal, while it admits of easy statement, is difficult of solution. The question is whether the appellant workman having accepted from his employers (the respondents) payments of compensation under the Workmen's Compensation Act, 1925, knowing them to be

(1) [1940] A. C. 412, 418.

(2) Ibid. 429.

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payments under that Act, is debarred by reason of s. 29, sub-s. 1, of that Act from taking proceedings independently of that Act for the recovery of damages from his employers. [His Lordship stated the sub-section and continued:]

The relevant dates are these :—The accident occurred on April 3, 1942; the appellant received payment of the appropriate compensation (viz. 1*l.* 15*s.* a week) until he returned to work on October 2, 1942; on February 5, 1943, he issued the writ in the present litigation, claiming damages for negligence and breach of statutory duty. The only defence on which the respondents now rely is s. 29, sub-s. 1, of the Act. Mr. Commissioner Laski, who tried the action at the Manchester Assizes, found the following facts :—(1.) that on and after April 30, 1942, the appellant accepted the weekly payments knowing them to be made as compensation under the Act; (2.) that the appellant when he began to receive those payments did not know “that he had a right under s. 29, sub-s. 1, of “the Workmen’s Compensation Act to elect as between two “alternative remedies”; and (3.) that in or about July, 1942, he did become aware of that right. The learned Commissioner, on the finding first above-mentioned, felt bound to dismiss the action in view of two authorities in the Court of Appeal, namely, *Perkins v. Hugh Stevenson & Sons, Ltd.* (1) and *Selwood v. Townley Coal & Fireclay Co., Ltd.* (2), which may, I think, be accurately described as having decided that a workman who has knowingly accepted as such payments of compensation under the Act, is precluded from recovering compensation independently of the Act.

My Lords, let me say at once, that in my opinion the present appeal must fail whatever view be taken as to the correctness of the decisions of the Court of Appeal, or the true interpretation of s. 29, sub-s. 1. The appellant knew in July, 1942, of the choice given to him by the sub-section, and with that knowledge chose to continue in receipt of compensation under the Act until he returned to work. Having thus, in exercise of the option given to him by the sub-section, enforced to the full one liability of the employer, he cannot enforce any other; in other words, having, in exercise of his option, enforced to the full the employer’s liability to pay compensation under the Act, he cannot take proceedings to make the employer pay compensation independently of the Act. He has deliberately selected and exhausted one of the

(1) [1940] 1 K. B. 56.

(2) [1940] 1 K. B. 180.

two rights which the sub-section offers for his choice. In view, however, of the course taken by the debate before your Lordships, I may be permitted to state my views upon the true construction of the sub-section. It contains four provisions to the following effect :—1. The civil liability of the employer is not affected by the Act when the injury was caused by the personal negligence or wilful act therein described. 2. If the injury was so caused the workman is given a choice as to which liability he will seek to enforce. 3. The employer is not to have to pay compensation to the workman both independently of the Act and under its provisions. 4. No action may be brought against the employer in respect of an injury to a workman by accident arising out of or in the course of his employment, unless the injury was caused by the personal negligence or wilful default as aforesaid. The sub-section only applies when the injury was caused by the personal negligence or wilful default described in the opening words, but when it applies, it operates for the benefit of both the workman and the employer. On the one hand the first provision preserves to the workman the civil liability of the employer, and the second provision gives him a choice between enforcing that liability and enforcing the liability imposed on the employer by the Act. On the other hand, the third provision protects the employer from being obliged to meet both liabilities. The fourth provision may for the present purpose be disregarded. The second and third provisions are the ones which create the difficulty. The Court of Appeal has treated the third provision as an enactment in favour of the employer which operates independently of the first and second provisions, and which in some way detracts from or qualifies the express saving in favour of the workman of the civil liability of the employer. It has construed the sub-section as meaning that once some compensation for injury to a workman has been paid under the Act, and has been accepted by him as such, the employer is freed from all liability to pay compensation independently of the Act. My Lords, I find myself unable so to construe the third provision. It is a construction which, in my opinion, should only be adopted if none other is open, because it destroys to a great extent the primary object of the sub-section, namely, the preservation in favour of the workman of the employer's civil liability. So long as in the long run an employer is not made to pay more than his total liability under the particular

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head of liability which the workman, knowing of his choice, chooses to enforce, the protection given to the employer by the third provision will be secured to him. He will not have paid two sets of compensation, but only the compensation payable under his liability independently of or under the Act as the case may be. For myself I would construe the sub-section as follows:—The object of the sub-section is to keep the civil liability of the employer alive, and it gives the workman a choice as to what liability he will enforce against the employer. But to make a choice the workman must be aware of his right to choose, and of the alternatives open to his choice. In the case of a workman who, owing to ignorance in these respects, has been unable to exercise his option under the sub-section, but who has been paid and has accepted compensation under the Act, even to the full amount, I cannot see how he can be prevented, on discovering his right to choose, from recovering compensation independently of the Act, if he be not barred by lapse of time. On the other hand, if a workman, who knows of his right to choose and of the alternatives open to his choice, has enforced his claim to compensation independently of or under the Act, he cannot thereafter seek to enforce any other liability of the employer. By the words “has enforced his claim,” I mean that he has obtained a judgment for damages at common law or compensation under the Employers Liability Act, 1880, or that he has obtained an award or an agreement for recording under s. 23 of the Act, determining the employer’s liability under the Act. When the workman has so made his choice of the liability which he desires to enforce, and has so enforced it, the sub-section has been worked out, and the chapter is closed. But unless and until he has so enforced the liability of his choice, I find nothing in the sub-section to prevent him from changing his mind, abandoning any pending proceedings in reference to one liability, and commencing proceedings to enforce the other liability.

In coming to this conclusion I find myself in substantial agreement with the views expressed by Lord Patrick in the case of *Brown v. William Hamilton & Co.*, (1), although I do not think that the rights of the workman under the sub-section are (as is indicated or suggested in many authorities) to be judged in the light of the strict rules applicable to the equitable doctrine of election. As I have said, the primary

(1) 1944 S. L. T. 282 ; 37 B. W. C. C. Supp. 52.

object of the section is to preserve the civil liability of the employer, making it plain on the one hand that it is the workman who may choose which liability shall be enforced against the employer, and on the other hand that the employer cannot be made to pay more than the measure of his liability independently of, or under, the Act as the case may be. Lord Patrick has pointed out the harsh results and the difficulties which would ensue if a workman is to be held to be deprived of his rights against the employer which are independent of the Act, by the mere acceptance as such of compensation paid under the Act. I need not repeat them, but they appear to me very real; and while no suggestion is or could be made against the employers in the present case, it is obvious that instances might arise in which, on the construction of the subsection adopted by the Court of Appeal, very grave injustice might be inflicted on a workman by his employer. As already indicated, however, this appeal must, in my opinion, fail.

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LORD MACMILLAN (read by LORD SIMONDS). My Lords, on the facts of the present case I have no doubt that the decision of the Court of Appeal was right in law. But as certain views on the proper interpretation of s. 29 of the Workmen's Compensation Act, 1925, are implied in that decision and as the opportunity has been taken of bringing under review the many and varying judicial expositions of this much-debated enactment, I agree with your Lordships that the House ought to pronounce on the matter generally. The remedy of compensation which the Act provides for accidents to workmen arising out of and in the course of their employment is expressly declared to be exclusive of all other remedies except in the single case of the accident having been caused by the employer's personal negligence or wilful act. In that case, but in that case only, the injured workman is given an option; he may either claim compensation under the Act or take proceedings independently of the Act under the pre-existing law. One thing at least is clear on the terms of the enactment: the injured workman is not entitled to make claims against his employer simultaneously for compensation under the Act and for damages independently of the Act. The remedies are mutually exclusive. The option given to the workman is no doubt important and valuable, but it should not be overlooked that the legislature in fixing the scale of statutory compensation must be taken to have regarded it as affording

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in the normal case fair and adequate compensation for the injury sustained, which physically is the same whether the accident was due to the employer's personal negligence or not. The reluctance manifested in some of the cases to hold that the workman has exercised his option in favour of the statutory compensation and the ingenuity exhibited in avoiding such a decision would seem to suggest that this consideration has not always been borne in mind.

The main controversy has centred round the question of what in law is to be held as committing the workman irrevocably to one or other of the two courses open to him when he has sustained an accident arising out of and in the course of his employment which has been caused by his employer's personal negligence or wilful act, the only case in which the statute gives him an option. The problem has in my opinion been confused by the importation of the refinements of the equitable doctrine of election. It has been said that in giving the workman an option between two courses the statute has put him to his "election"; an "election" to be valid and irrevocable can only be made where there is on the part of the workman knowledge of the alternatives and full information as to the advantages and disadvantages of deciding to adopt the one or the other. Consequently the workman cannot be held to have exercised his option and to have committed himself irrevocably to the one or the other remedy unless he was possessed of such knowledge and information. The result of this argument is to make the determination of the question whether the workman has irrevocably exercised his option dependent not upon what he has done but upon what he knew. In my view this is an erroneous approach to the matter. Carried to its logical conclusion the argument would entitle a workman who for years had received compensation under the Act from his employer, either by agreement or under an award, to turn round and institute proceedings for damages independently of the Act on the plea that he did not know, when he claimed and accepted or was awarded compensation under the Act, that he had any right to redress outside the Act. If he could prove that this was so, then he must be held never to have exercised his statutory option, never to have made an "election." Similarly, on this argument, if the workman had intimated a claim of damages outside the Act and obtained from his employer, with or without proceedings in court,

a sum in full satisfaction of his claim, he could nevertheless throw over the settlement and have recourse to a claim for compensation under the Act if he could show that he had not been aware of his rights under the Act when he made the settlement. Such an interpretation of the enactment would, in my opinion, be clearly contrary both to its letter and to its spirit. In one case the Act permits a *locus pœnitentiæ*. If the workman exercises his option by bringing an action to recover damages independently of the Act and fails in that action, he may move the court to assess and award him compensation under the Act, if otherwise entitled to it, subject to deduction of the costs caused to his employer by his unsuccessful action. There is no parallel provision in the case of an unsuccessful claim under the Act. The inference is clear that the workman cannot try his luck first under the Act and then if unsuccessful independently of the Act or vice versa, apart from the single special concession which I have just mentioned. It would be a singular situation if the employer could have no assurance that finality had been reached in settling a claim either under or independently of the Act unless he had taken steps to satisfy himself of the state of the workman's mind and that the workman had made a fully informed "election" between the alternative courses open to him. It would be grotesque to suggest that the employer to whom a claim under the Act has been made must ask the workman if he has considered the possibility of bringing an action against him for personal negligence or wilful fault, lest otherwise any settlement of the claim under the Act might have no finality because there had been no "election" on the part of the workman. The workman, like any other citizen, must be presumed to know the rights which the statute has given him, and must be judged according to what he does in the exercise of these rights and not according to the extent of his knowledge of them. I quote and adopt the words of Scrutton L.J. : "If by statute you have an option to do A or 'B, but not both, and you have done A, it does not seem to me 'relevant to say 'I have done A, but I have not elected 'to do it'." (*Bennett v. L. & W. Whitehead, Ltd.* (1). If one of the alternatives is adopted the other is excluded, no matter what failure there has been to appreciate the respective merits of the one or the other. But this unfortunately is far from ending the matter. It still remains to consider what

(1) [1926] 2 K. B. 380, 405.

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I begin with the easiest case, on which there appears to be general agreement. If the workman's claim either under or outside the Act is contested and he institutes proceedings which are carried through to their conclusion and result in an award of compensation under the Act or in a judgment for damages outside the Act, all are apparently now agreed that finality has been reached. The workman cannot be heard to say that in proceeding in the one way or the other he was unaware of his rights and had never truly exercised his option. But what if the workman fails in the proceedings which he has taken? Is he entitled then to resort to the alternative proceedings which he might have taken but did not take? The answer in my opinion is in the negative. I quote and adopt the words of Cozens-Hardy M.R. in *Cribb v. Kynoch, Ltd.* (No. 2) (1): "I think that the true meaning of the Act is "that a workman cannot proceed to trial under the Act and "fail and then proceed by common law action, and also "cannot proceed by common law action and having failed in "that action then proceed under the Act," subject of course to the special right accorded under sub-s. 2 of s. 29. The workman by persisting to a conclusion in the proceedings which he has taken has irrevocably committed himself. He cannot be heard to say that he has exercised his option only conditionally on success. This view was emphatically approved in Scotland by a court of seven judges in the case of *Burton v. Chapel Coal Co., Ltd.* (2). But in that case a qualification was admitted, based on the Scottish decisions in *Blain v. Greenock Foundry Co.* (3) and *M'Donald v. James Dunlop & Co., Ltd.* (4), and the English case of *Rouse v. Dixon* (5). If the reason of the workman's failure to recover compensation in proceedings under the Act was that his case did not fall within the Act, then, it was said, he was not barred from proceeding outside the Act. The ground for this view, as stated by Lord Low in *Burton's* case (6), is that the

(1) [1908] 2 K. B. 551, 555.

(2) 1909 S. C. 430; 2 B. W. C. C.

120.

(3) (1903) 5 F. 893.

(4) (1905) 7 F. 533.

(5) [1904] 2 K. B. 628.

(6) 1909 S. C. 430, 441, 442.

enactments were "intended to meet the case of a workman "who has, in fact, an option between a claim under the Act "and a claim independently of the Act, and therefore have no "application to the case of a workman who does not fall "within the purview of the Act, and has no title to claim "compensation under it." I do not accept this qualification. In contested claims for compensation the employer's most frequent answer, apart from questions of quantum, is that the claim does not fall within the Act because the accident did not arise out of or in the course of the employment. If the employer succeeds in this plea he is nevertheless, if the qualification is well-founded, to be exposed to entirely new proceedings outside the Act. This is, in my opinion, contrary to the true interpretation of the Act. I agree with Scrutton L.J. that if the workman's case fails it makes no "difference "whether the applicant fails because he is not, or fails "although he is, a 'workman' or 'dependant' within the "Act" (*Bennett's case* (1)). If the workman takes proceedings under the Act and carries them to a conclusion, then he has exhausted his rights, notwithstanding that the conclusion may be that his case does not fall within the Act, for example, because the accident did not arise out of or in the course of his employment. He cannot be heard to say that he has exercised his option only conditionally on his case being held to fall within the Act. The proceedings are under the Act none the less that the result of the proceedings may be that the workman's case is held not to come within it. "Proceedings carried to a determination are conclusive "evidence of a final election" (*per* Bankes L.J. in *Bennett's case* (2)).

Next, what if the workman, having instituted proceedings either under or outside the Act, withdraws from them before a decision is reached? As the law stands, under the authority of the case of *Bennett*, notwithstanding the vigorous dissent by Scrutton L.J., the workman is not held to have irrevocably committed himself by the initiation of proceedings from which he has resiled. Bankes L.J., who was in the majority, seems nevertheless to have thought (3) that it was a question of circumstances and that a workman might in some circumstances be held to have irrevocably committed himself by taking proceedings not persisted in to a conclusion. This

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(1) [1926] 2 K. B. 380, 385.

(3) *Ibid.* 390.(2) *Ibid.* 391.

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leaves the law in an unsatisfactory state. It has been suggested that there are two and only two rival constructions of the section, (1.) that it protects the employer from being proceeded against more than once; (2.) that it protects him only from being made to pay more than once. But this clean-cut choice of interpretations has not been accepted or logically applied. The mere intimation of a claim for compensation, although a step in proceedings, has not been held to be an irrevocable exercise of the workman's option. The hardship of so holding has moved the courts not to do so, though on a strict and literal reading of the section it looks very like as if this was intended and Scrutton L.J. so thought. Suppose a workman makes a claim on his employer under the Act—it may be quite informal and need not even be in writing—and the employer declines to admit it, pointing out that he has an irrefutable answer to it, the validity of which the workman at once recognizes. Is the workman by having made this abortive claim finally precluded from resorting to an action of damages for which he may have an excellent *prima facie* case? Similarly if the workman has issued a writ in an action of damages and on seeing the defence at once recognizes that he has no case, must he go on with the action to its inevitable conclusion against him in order to obtain a “determination” that the injury is, one for which the employer is not liable and so enable himself to obtain compensation under sub-s. 2 of s. 29 less the costs of the action? While I have thus indicated the sort of considerations involved, I am not disposed in the present case, in which the point does not arise, to express a concluded opinion upon it. It may never have to be decided by this House, in view of the general revision of the law of workmen's compensation which the Government has announced that it has in contemplation.

I pass now to consider the position where there have been no proceedings either by way of arbitration under the Act or by way of action independently of the Act. If the injured workman intimates a claim against his employer on the ground of the employer's personal negligence or wilful act and the employer admits liability and settles with the workman by payment of an agreed sum, in such a case I think there can be no question that the workman must be held to have exercised his option irrevocably. If on the other hand the workman intimates a claim under the Act and the employer admits liability and proceeds to make to the workman the

payments due under the Act, I equally see no reason why the workman should not be held to have exercised his option irrevocably. The Act contemplates that in the normal case claims will be settled by agreement without resort to proceedings, and the vast majority of cases are so settled. I cannot see any good reason for holding that finality is reached where as a result of proceedings in a contested case there has been a determination of the matter in favour of or against the workman, but that where a contest has been avoided by agreement the workman should be entitled to maintain that he has never exercised his option. An agreement can under the Act be rendered as enforceable as an award after proceedings. It is, of course, essential that there be a real agreement between the parties for the payment and acceptance of compensation under the Act. But where there is sufficient evidence of such an agreement I do not think that it is open to the workman to challenge it on the ground that he has never exercised his option because he did not know that he might have brought an action against his employer for damages or had not information to enable him to weigh the comparative advantages of claiming under the Act and claiming independently of the Act. An agreement under the Act need not be in writing. It may be oral or inferred from the facts and circumstances. It does not seem to me to make any difference whether the agreement results from a claim by the workman admitted by the employer or from an offer by the employer accepted by the workman or from the conduct of the parties. What is essential is that the agreement should be an agreement under the Act ; that is to say, that the parties should understand that they are transacting about the right to compensation which the Act confers. And of course it must be a real agreement ; it must not be vitiated by mutual error, fraud, undue influence or any of the other grounds on which the validity of an agreement may be assailed. A fortiori if there has been not only agreement under the Act but payments under the Act on the faith of the agreement, the evidence of the workman having finally exercised his option is conclusive. Further, the acceptance by the workman of payments expressly made under the Act and accepted by him as such is sufficient evidence of the agreement of the parties and of the workman having irrevocably committed himself.

In the present case the appellant workman did not take

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The appeal should, in my opinion, be dismissed and the judgment of the Court of Appeal be affirmed.

LORD PORTER. My Lords, this case raises again a question which has many times been before the courts of this country. In the action the substantial defences were that the appellant was guilty of contributory negligence and that in any event, having claimed and received compensation under the Workmen's Compensation Act, he was debarred from recovering damages. The learned judge negatived the former of these two defences, but, whilst making the findings set out above, felt himself bound by authority to hold that the latter must succeed. This defence is the creature of statute and depends on the construction to be placed on s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, which, so far as is material, is in the following terms. [His Lordship stated the sub-section and continued:] The wording is not very artistic, but the aim is, I think, clear enough, namely, to leave the workman his choice of two remedies whilst preventing the employer from having to pay both damages and

(1) [1944] K. B. 718, 721.

(2) [1940] 1 K. B. 56.

(3) [1940] 1 K. B. 180.

(4) 1944 S. L. T. 282; 37 B. W. C. C. Supp. 52.

compensation. Apart from authority, I should have thought it reasonably plain that whereas the workman can choose which of his two types of remedy he would pursue, he cannot recover both damages and compensation, and at some time or other he must reach the position when he is bound to the one and debarred from the other. Your Lordships have to determine when and by what means that position is reached. The appellant maintained that the choice continues until the workman can be said to have exercised the option which the Act gives him. The true construction of the sub-section was, he said, to be found by reading the second part as exegetical or explanatory of the first, i.e., by interpreting it as meaning that the workman might at his option pursue either remedy, provided that by doing so he did not ultimately impose a liability upon his employer to pay both damages and compensation. In his contention that point would not be reached unless either a judgment had been obtained in his favour in a claim for damages or an award made in his favour or an agreement for compensation registered. In support of this argument he cited the observation of Kennedy J. in *Rouse v. Dixon* (1): "It is not impossible to construe s. 1, "sub-s. 2 (b)" (the corresponding section in the Act of 1897) "as meaning that the option may be exercised unless and "until a claim has proceeded to a decision." The respondents, on the other hand, urged that the two parts of the sub-section were to be read separately; that the choice made by the workman was irrevocable if he received workmen's compensation as such, and in any case that, as the Court of Appeal has held, the acceptance of either damages or compensation as such was a bar to recovery under the alternative remedy. Even though the respondents' argument be, as I think it is, unsound, yet in the present case I can have no doubt but that, after his solicitor's letter of July 24, the appellant knew that he could claim damages and with this knowledge continued to accept compensation. Up till then in my view he might have withdrawn his claim under the Act, but after that time he was confined to the remedy of which he continued to take advantage. Conversely, if he had brought an action knowing what he did and failed, he could not thereafter have applied for workmen's compensation were it not for the terms of s. 29, sub-s. 2, which expressly make provision for this contingency. See *Edwards v. Godfrey* (2), and *Cribb v. Kynoch, Ltd.* (No. 2) (3).

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(1) [1904] 2 K. B. 628, 634.

(3) [1908] 2 K. B. 551.

(2) [1899] 2 Q. B. 333.

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The general principle is founded on Lord Blackburn's dictum in *Kendall v. Hamilton* (1): "There cannot be election until there is knowledge of the right to elect." It finds support in such cases as *Rouse v. Dixon* (2), *Bennett v. L. & W. Whitehead, Ltd.* (3), and *Unsworth v. Elder Dempster Lines, Ltd.* (4), and is not inconsistent with *Burton v. Chapel Coal Co., Ltd.* (5), where it was decided that a workman cannot sue for damages after failure to recover under the Act in a case where he has brought his action with full knowledge of the alternative remedy. Moreover, cases such as *Mackay v. Rosie* (6), and *Birch v. Pease & Partners, Ltd.* (7), are not antagonistic in deciding that acts may be evidence of choice. Whether the workman has chosen is a matter of fact, but the effect of his knowledge or ignorance that he has alternative remedies is a matter of law. In so far as *Perkins v. Hugh Stevenson & Sons, Ltd.* (8), and *Selwood v. Townley Coal & Fireclay Co., Ltd.* (9), depart from these principles and decide that the mere acceptance of compensation as such, but in ignorance of the existence of an alternative remedy, is a fatal bar to a claim for damages, I think they are wrong. I prefer the reasoning of Lord Patrick in the more recent case of *Brown v. William Hamilton & Co.* (10), where he reviews the Scotch cases and refuses to follow the two last-mentioned English cases. I should be content to follow his conclusion and reasoning, but as the matter has been fully argued I think I ought give the grounds for my preference. In the English cases, as I understand them, the Court of Appeal construed s. 29, sub-s. 1, as divisible into two parts. Under the first they acknowledged the existence of the workman's option, at any rate unless and until he accepted compensation under the Act as such, but under the second they held that a workman who had claimed and received compensation or had accepted compensation as such had precluded himself from suing for damages even though he did not know that he had an alternative remedy; it was enough that he knew he was receiving workman's compensation as such. The Court of Appeal, as I understand them, in so holding relied solely on the

(1) (1879) 4 App. Cas. 504, 542.

(2) [1904] 2 K. B. 628.

(3) [1926] 2 K. B. 380.

(4) [1940] 1 K. B. 658.

(5) 1909 S. C. 430; 2 B. W. C. C.

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(6) 1908 S. C. 174; 1 B. W. C. C. 52.

(7) [1941] 1 K. B. 615.

(8) [1940] 1 K. B. 56.

(9) [1940] 1 K. B. 180.

(10) 1944 S. L. T. 282; 37

B. W. C. C. Supp. 52.

second half of the sub-section and thought it unnecessary to have regard to the earlier part which gave the workman a choice. The mere payment and receipt of compensation was said to free the employer from the alternative liability, inasmuch as to expose him to such a claim would be to render him liable to pay twice over. So long as it was thought that, if compensation was paid, there was no method of recovering what had been so paid or of setting it off against any damages afterwards awarded, there was force in this argument (see *Perkins' case* (1) and *Selwood's case* (2)), but once it was acknowledged, as it was in *Unsworth v. Elder Dempster Lines Ltd.* (3), that this view was mistaken and that any compensation previously paid could be deducted from damages when awarded, the argument loses its efficacy. In a case where this course is adopted the employer does not pay twice nor has his liability to pay been finally determined. In my view, unless the dispute has reached the stage at which the employer is at least compellable to pay, either by judgment in an action or by award or registered agreement under the Act, he cannot be said to be liable to pay within the wording of the sub-section. Even a failure at law or the dismissal of a claim for compensation would not be enough ; there must be some binding decision under which the employer is liable to pay. The provisions of this part of the sub-section are a defence against a legal liability to pay twice, not a method of ascertaining whether the workman has or has not made an irrevocable choice. But a choice has to be made under the first part of the sub-section and must at some time become irrevocable. When does this occur ? I can find no answer, except that it comes when the workman is fully aware of the alternatives and deliberately makes his choice between them. He must not only know that he has claimed, or is offered or is receiving, workman's compensation as such, he must also know that he has an alternative remedy.

The opinion I have been expressing is, I think, in accordance with the view of your Lordships' House as expressed in *Kinneil Cannel & Coking Coal Co., Ltd. v. Waddell* (4). In *Codling v. John Mowlem & Co., Ltd.* (5), Atkin J., as he then was, had said that the provisions referred to in the latter part of the section give to the employer the right, independent of

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(1) [1940] 1 K. B. 56.

(2) [1940] 1 K. B. 180.

(3) [1940] 1 K. B. 658.

(4) [1931] A. C. 575.

(5) [1914] 2 K. B. 61, 69.

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the exercise by anyone of the option, not to pay twice over, and further that this would be the result although payment under the statute was made without the knowledge and consent of the plaintiff who was seeking to enforce common law rights. Lord Buckmaster did not agree, and Lord Dunedin, said (1) : " What I think the section means to say, and what involves " no absurdity, is that no individual is to get two payments, " one at common law and the other under the Act." If the workman, knowing of the alternative, makes his choice, I should regard the option as exercised. But if he had not this knowledge, a claim for damages which either was not brought to a conclusion, or if brought to a conclusion failed, need not be a final election. Even judgment in favour of the workman would not of itself necessarily be a final choice, but it would bar a claim under the Act because the employer, being thereby liable to pay independently of the Act, could not be made liable to pay under it ; the wording of the second half of the sub-section would protect him. For the same reason an award or registered agreement under the Act would likewise protect the employer. But short of such a conclusion I do not see why the workman should not withdraw from one claim and proceed in the other, always provided he has not deliberately chosen the one or the other with full knowledge that the alternative is open to him. In the present case I think the appellant did make such a choice, and I would for that reason, but for that alone, dismiss the appeal.

LORD SIMONDS. My Lords, I concur in the motion that this appeal, the facts of which I need not rehearse, should be dismissed and will add only some observations on the meaning and effect of s. 29 of the Workmen's Compensation Act, 1929, which, having caused so much controversy in the English, Scotch and Irish courts, is now, I hope, to be replaced by a provision more easily intelligible. The section in question is, I suppose, introduced for the benefit of both the employer and the workman. The Workmen's Compensation Acts provided a new remedy for an injured workman but they could not be read so as to take away from him an existing right at common law in the absence of a provision to that effect. Yet it was clearly unfair to the employer that in respect of the same act or omission he should be doubly liable : therefore some provision against that event had to be made. It was made

(1) [1931] A. C. 575, 584.

by s. 29 of the Act of 1929 as similar provision had been made by the earlier Acts: the question for your Lordships' consideration is, what does the section mean? My Lords, there are, I think, two separate questions involved. The first is what is meant by saying that the workman may at his option do one of two things. Having done one of those two things is he debarred from doing the other of them, only if (as some would say) he knew that he had a choice, or (as others would say) he both knew that he had a choice and was aware of all the facts relevant to the making of the particular choice? Or having done one of those two things, is he, whatever his state of mind may have been, altogether debarred from doing the other of them on the footing that his act proclaims his choice? The second question is, what act or acts amount to claiming compensation under the Act or taking proceedings independently of it, as the case may be, so that after such acts the workman is debarred from his other remedy? That is a question that arises whatever answer may be given to the first question.

Upon the first question I respectfully concur in what has been said by my noble and learned friend Lord Macmillan, whose opinion I have had the advantage of reading. I agree in thinking that much confusion has arisen from importing into the consideration of this section the niceties of the equitable doctrine of election. I do not understand how a workman, being given the statutory choice between what I will for brevity call claim and action, can make his claim and later say, "I will now bring my action, for when I made my claim I was unaware that I could bring an action." It is not clear to me whether the contention that he can do so is based solely on the words "at his option" which are found in the section. I do not think that it is logical that it should. For without those words the section gives the choice "the workman may . . . claim compensation . . . or take proceedings . . .", and if where there is a choice, an act, however unequivocal, is not decisive unless the actor is aware of his rights, the words "at his option" add nothing. In *Bennett v. L. & W. Whitehead, Ltd.* (1), Scrutton L.J. said: "I do not think you can escape the statutory prohibition against doing a thing by saying that, though you have done it, you have not elected to do it." This expresses my own view with admirable terseness. If the statute says that

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a man may do one of two things, that involves that he may not do both. If he does one of them he cannot escape by saying : " I did not choose or elect to do it." He has done it. *Res ipsa loquuta est*. If it is said that this gives no meaning to the words " at his option," I should be inclined to agree, but in any event they are superfluous since he, who has the choice, has also the option. The value of the words, as it appears to me, lies in this, that they make doubly clear, what was already clear enough, that it is for the workman not the employer to say which remedy shall be pursued. But that does not mean that, when the workman has pursued one remedy, he can deny that it was his choice.

My Lords, in coming to this conclusion on what I conceive to be the first question, I am assisted by a consideration of the difficulties, overwhelming as they appear to me to be, if the alternative view is accepted, viz., that, whatever a workman may have done, he is not debarred from his alternative remedy unless he has made a conscious choice between the two remedies. It is significant that, as I pointed out earlier in this opinion, it is not agreed amongst those who adopt this view, what degree of knowledge is sufficient to make the choice effective. On the one hand it is said that there must be knowledge that there is a right to choose : no more apparently is needed. On the other hand it is said—and I will take the latest statement of this kind from the judgment of Scott L.J. in *Coe v. London and North Eastern Ry. Co.* (1) : " That " option is, beyond doubt, a legal right of election, and no " election can be exercised by the elector without full " knowledge of all material facts affecting his choice." In this view there must be knowledge not only of the possibility of choice in general but of all the material facts affecting the particular choice. If indeed it is relevant to ascertain the state of the workman's mind, when he makes his claim or brings his action, the latter view appears to me more consistent and logical, for it is of little use to the workman to know in general that he has a choice unless he knows also all the facts which should guide him in making it. The theory postulates that the workman is instructed before he acts. I see no justification for stopping half-way and saying that it is sufficient for him to know that he has a choice and that it does not matter how much or how little he knows of the facts relevant to that choice. But, my Lords, if the view so

(1) [1943] K. B. 531, 540.

expressed by Scott L.J. is the right one, the practical difficulties are grave indeed. There are no doubt regions of the law in which it is necessary to inquire into the state of a man's mind. But the inquiry must always be a difficult one, not lightly to be undertaken. Here "all material facts affecting his choice" must include the very facts which can perhaps only be ascertained on a judicial determination of his claim or action, and, even when they have been ascertained, there may be nice questions as to their bearing upon such problems as the doctrines of contributory negligence or "volenti non fit injuria" introduce. It would appear that the workman can make no fully instructed choice until he has been taught by failure or success in the claim or action that he has made or brought, and that it is only after that that any act on his part is final or irrevocable. If so, it is strange that it should have been thought necessary in a certain event and subject to certain conditions to preserve to him his alternative remedy namely, to permit him, if he brings his action and fails in it, to ask the court to assess and award him compensation under the Act. My Lords, I would say, expanding what I venture to think was in the mind of Scrutton L.J. in the passage that I have cited, that this is but an example of the fundamental proposition that a man intends the natural consequences of his acts. He is judged by what he does, not by what he thinks. Given alternative rights against his employer he exercises one of them: the employer, for whose benefit has been introduced, the limitation of alternative remedy, is bound neither to enlighten him nor to inquire into his state of mind. He is entitled to assume that that which the workman has done he has intended to do, that he has "at his option" made his claim or brought his action, as the case may be. I think, with deference to those who think or have thought otherwise, that Lord Blackburn's dictum in *Kendall v. Hamilton* (1), that there cannot be an election without knowledge of the right to elect (a dictum uttered in a widely different context) does not assist your Lordships in the construction of this section.

Answering the first question that I have posed by saying that it is what the appellant did, not what he knew or thought, that matters, I turn to the second question and ask whether he so acted that he was debarred from taking proceedings independently of the Act. Upon this question I understand that no doubt is entertained by your Lordships that, however

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much the simple words, "claim compensation under this Act," where they occur in this section, may be expanded or refined, however liberally the section may be construed in favour of the workman, the present appellant so acted and, if it be material, continued so to act with knowledge of his rights, as to debar him from his alternative remedy of action. Under those circumstances, fully concurring in the conclusion, I do not think it necessary to consider the widely divergent views that have been held upon this subject. But I would safeguard myself in any future consideration of the matter, if it should come again before this House, by saying that I am far from satisfied that a somewhat strained and unnatural meaning has not been placed upon simple words. It is clear, I think, what the words "take proceedings independently of this Act" mean. That is one remedy open to the workman. The other remedy is to "claim compensation under this Act." If it becomes material, I should wish to consider how far it is legitimate to construe these plain words as importing anything more than a demand for compensation as of right, which I understand to be the natural and primary meaning of "claim." Nor should I, unless constrained by authority, be prepared without further consideration to accept the view that it is only against an ultimate double liability that the section protects the employer. That it has that result is certainly true, but as at present advised I do not see why it does not further protect him from proceedings independently of the Act if a claim for compensation under the Act has been already made. That is what the section seems in clear language to say. It may be thought desirable to give a greater latitude to the workman in the pursuit of his alternative remedies. That is a matter for the legislature. I am for my part unable by judicial interpretation of the section in its present form to achieve that result. The appeal should in my opinion be dismissed.

Appeal dismissed.

Solicitor for appellant : *W. H. Thompson.*

Solicitors for respondents : *Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester.*

[PRIVY COUNCIL.]

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APPELLANTS ;

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RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada—Ontario—Dominion Temperance Act—Re-enactment of previous materially identical legislation—Constitutional validity—Relative to the “peace, order and good government of Canada”—Binding authority—Canada Temperance Act, R.S.C., 1927, c. 196, Pts. I., II. and III.—British North America Act, 1867 (30 & 31 Vict., c. 3), ss. 91, 92.

Russell v. The Queen (1882) 7 App. Cas. 829, by which the Canada Temperance Act, 1878, was held to be within the legislative competence of the Dominion Parliament under s. 91 of the British North America Act, 1867, on the ground that it related to the peace, order and good government of Canada, and did not deal with any of the matters exclusively reserved to the provinces by s. 92 of the Act of 1867, was rightly decided, and must be regarded as firmly embedded in the constitutional law of Canada, and it follows that Parts I., II. and III. of the Canada Temperance Act, R. S. C., 1927, c. 196, which replaced the Act of 1878 and consolidated therewith the various amending Acts that had from time to time been enacted, and the material provisions of which were identical with those of the Act of 1878, were equally valid Dominion legislation.

The British North America Act, 1867, nowhere gives power to the Dominion Parliament to legislate in matters which are properly within the competence of the Provincial Legislatures merely because of the existence of an emergency. An emergency may be the occasion which calls for legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not. The true test must be found in the real subject-matter of the legislation ; if it is such that it goes beyond local or provincial concern or interests and must, from its inherent nature, be a concern of the Dominion as a whole, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the Provincial Legislatures.

To legislate for prevention appears to be on the same basis as

* *Present* : VISCOUNT SIMON, LORD THANKERTON, LORD ROCHE, LORD GREENE and LORD GODDARD.

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legislation for cure, and if the subject-matter of the legislation is such that it comes within the province of the Dominion Parliament that legislature must have power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed to have necessitated the earlier statute.

Judgment of the Court of Appeal for Ontario [1939] O. R. 570, affirmed.

APPEAL (No. 2 of 1940) from a judgment of the Court of Appeal for Ontario (September 26, 1939) on a reference by the Lieutenant-Governor in Council for hearing and consideration of the following question: "Are Parts I., II. and III. of The "Canada Temperance Act, R.S.C., 1927, c. 196, constitutionally "valid in whole or in part, and if in part, in what respect?" Part II. of the Act prohibited the sale of intoxicating liquor in any county or city in the Dominion from the time such Part was brought into force therein. Part I. provided the procedure, by a system of local option on a majority vote, for bringing it into force. Part III. provided penalties for breaches of the Act.

A majority of the judges of the Court of Appeal (Riddell, Fisher, McTague and Gillanders J.J.A.) answered the question in the affirmative, considering themselves bound so to answer by the decision in *Russell v. The Queen* (1). Henderson J.A., dissenting, answered the question in the negative.

1945. Dec. 3, 4, 5, 6, 10. *Sir Cyril Radcliffe K.C.* and *C. R. Magone K.C.* (of the Canadian Bar) for the appellant the Attorney-General for Ontario. The Canada Temperance Act, R.S.C., 1927, so far as Parts I., II. and III. go, is in substantially the same form as the original Canada Temperance Act of 1878, the preamble of which—not included in subsequent consolidations—is strong evidence as to what the circumstances were at the time of the original Act, and much of this case turns on the circumstances which are said to have given the Dominion power to pass this particular legislation. The effect of the Act in question was to produce legislation affecting either "civil "rights and property within the Province," a subject-matter within the exclusive legislative competency of the Province under head 13 of s. 92 of the British North America Act, 1867, or "matters merely local and private within the Province," and so within exclusive Provincial competence under head 16 of s. 92 of the Act of 1867. It is local in this case because the

(1) (1882) 7 App. Cas. 829.

whole issue before the elector in the county or city is the local question whether within his area persons dealing or trafficking in alcohol should come under the restriction of the prohibition. As to property and civil rights, *prima facie*, at any rate, it is legislation in relation to these two classes of matters. A further question is whether, if it can be said to be legislation in relation to heads 13 and 16 of the Constitution Act, it can be right to say that the general residuary power of the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to subjects not covered by s. 92 can justify this particular Act. This Board has held that there are cases when the circumstances are so extreme, and the emergency so great, that although the matter would otherwise come within one of the heads of s. 92, it passes out of that in the circumstances of emergency and falls within the necessary power of the central legislature under peace, order and good government to save the life of the nation—the words have been as strong as that. There were not the circumstances existing in 1924-5, when the Temperance Act was last revised, which could give the Parliament of Canada authority to treat this subject-matter as an emergency and legislate accordingly. The time has come, it is submitted, for the Board to review *Russell v. The Queen* (1), by which the Canada Temperance Act, 1878, was held valid, and declare it not to be a good decision; it has been losing strength. [The whole judgment in *Russell v. The Queen* (1) was read, and reference was also made to *Hodge v. The Queen* (2), *Att.-Gen. for Ontario v. Att.-Gen. for the Dominion* (3), and *Att.-Gen. for Manitoba v. Manitoba Licence Holders' Association* (4).] It was said in the last cited case that the result of the decisions was remarkable, with *Russell v. The Queen* (1) on one side and *Att.-Gen. for Ontario v. Att.-Gen. for the Dominion* (3) on the other. Reliance is placed on the last case (3) for the view that legislation providing for local option about prohibition in a provincial sub-division is in its true meaning legislation either in relation to civil rights and property or matters merely local and private to the province within the meaning of s. 92. If the Board had not taken that view in that case there would have been no place for the validity of the Ontario local prohibition Act. If that is the case, how can a Dominion statute which provides for nothing different except local option for the prohibition of liquor traffic in a sub-

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(1) 7 App. Cas. 829.

(3) [1896] A. C. 348.

(2) (1883) 9 App. Cas. 117.

(4) [1902] A. C. 73.

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division of the province avoid being legislation in respect of either head 13 or 16 of s. 92, even though the provision be conceived by the Dominion as one for the general advantage of Canada as a whole, or for the securing of uniform legislation throughout the Dominion, and therefore referred to peace, order and good government, because the Dominion power to legislate for peace, order and good government is subject to the exception of matters which come within the sub-heads of s. 92.

Next, there are three cases in which it was argued, founding on *Russell v. The Queen* (1), that the Dominion Acts there in question, although they trenched on civil rights and property within the Province, were within the Dominion power to legislate for peace, order and good government because they affected the affairs of the Dominion as a whole. The Acts were held invalid, and the three cases show how extreme that general power under s. 91 must be not to be affected by the exclusion of the sixteen sub-heads of s. 92: *Att.-Gen. for Canada v. Att.-Gen. for Alberta* (2); *In re Board of Commerce* (3), and *Toronto Electric Commissioners v. Snider* (4). It was said in the last case that "Their Lordships find it difficult " to explain the decision in *Russell v. The Queen* (1) as more than " a decision of this order upon facts, considered to have been " established at its date rather than upon general law " (5); and it was said: " Their Lordships think that the decision in " *Russell v. The Queen* (1) can only be supported to-day, not " on the footing of having laid down an interpretation, such as " has sometimes been invoked of the general words at the " beginning of s. 91, but on the assumption of the Board, " apparently made at the time of deciding the case of *Russell v. The Queen* (1), that the evil of intemperance at that time " amounted in Canada to one so great and so general that at " least for the period it was a menace to the national life of " Canada so serious and pressing that the National Parlia- " ment was called on to intervene to protect the nation from " disaster " (6). That is a very important judgment; it is sometimes said that what was there said with regard to *Russell v. The Queen* (1) was obiter, but that is not an adequate description of the Board's observations. Looking at the Dominion

(1) 7 App. Cas. 829.

(4) [1925] A. C. 396.

(2) [1916] 1 A. C. 588.

(5) Ibid. 413.

(3) (1920) 60 S. C. R. (Can.)

(6) Ibid. 412.

456, 506-12; [1922] 1 A. C.

191, 196.

Acts dealt with in the above three cases there is on the face of all of them no less an apparent intention on the part of the Dominion to make a general law for Canada as a whole than the present local option Act can show ; it is difficult to say that there was any situation less grave for the Dominion than is found in the Canada Temperance Act, and yet the Board said that in all those cases the Acts were not within the Dominion power. [Reference was also made to *Fort Francis Pulp and Power Co. v. Manitoba Free Press Co.* (1).] There are also passages in three cases which, it is submitted, have treated as beyond question to-day this doctrine of the necessary limitation of the Dominion power to legislate successfully under peace, order and good government when the subject-matter of the legislation is capable of being regarded in another aspect as being within the provincial powers: *In re The Regulation and Control of Aeronautics in Canada* (2); *Att.-Gen. for Canada v. Att.-Gen. for Ontario* (3); and *In re The National Products Marketing Act, 1934, and its Amending Act, 1935* (4), which last has been commended by the Board as the locus classicus, and is of peculiar importance to this argument, for Duff C.J. disclaims the idea that the fact that a problem is of national importance is sufficient to bring it within the general powers of s. 91, and he stresses how exceptional the circumstances must be. It is submitted that if the Board who decided *Russell v. The Queen* (5) in 1882 had read that judgment of the Supreme Court they would not have felt at liberty to decide it in the way they did. The constitutional doctrine has grown. There are two cases, quite simply, where the Dominion can claim its power to legislate under peace, order and good government, first, where the subject-matter of the legislation is inherently something which is outside the actual provisions of ss. 91 and 92 of the British North America Act ; and secondly, in the case of a new aspect of existing affairs in the Dominion, of which Lord Haldane spoke in giving the judgment of the Board in the *Fort Frances* case (1).

The authority under which the Act of 1927 exists to-day is the 1924 revision (14 & 15 Geo. 5, c. 65). Whether the exercise of that authority takes the form of revision or consolidation it was just as much a fresh plan by the Dominion Parliament at that time to make a law by repealing the pre-existing Act and

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(1) [1923] A. C. 695, 701.

(2) [1932] A. C. 54, 71-2.

(3) [1937] A. C. 326, 352-3.

(4) [1936] S. C. R. (Can.) 398,

416-26.

(5) 7 App. Cas. 829.

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putting a new Act in its place. Therefore, in the rare cases where the power of the Dominion rests on a claim that exceptional circumstances exist to justify its right to legislate, those circumstances must also exist at the time when the claim to make the new legislative provision is in fact made: *Snider's* case (1). It is submitted that the emergency, if it ever existed, was no longer there in 1927, and as all the provinces of Canada have passed legislation either controlling or prohibiting the sale of intoxicating liquor, a national emergency cannot be assumed to exist in relation to the traffic in intoxicating liquor. The provincial legislation shows a very different change of scene from anything that could have been contemplated by the makers of the Act of 1878. This branch of the argument assumes, of course, that the Act was originally validly enacted and that *Russell v. The Queen* (2) should be regarded as good law to-day. This is an occasion, however, when the Board should not shrink from reversing that decision if necessary: *Read v. Bishop of Lincoln* (3). Lastly, an emergency Act passed by the Dominion Parliament which infringed provincial rights would not be a valid Act at any time if it purported to be permanent Act. The Act in question does so purport. "Emergency" means temporary for this purpose.

Barton K.C. and *Bethune L. Smith* for the appellant, the Moderation League of Ontario, adopted the argument for the Attorney-General for Ontario, and on the jurisdiction of the Board to reverse a previous decision of the Board referred to *In re Transferred Civil Servants (Ireland) Compensation* (4). The main aspect of this case is the validity of *Russell's* case (2); primarily, the basis of the decision in that case is that the subject-matter of the Act of 1878 was not within any of the enumerated heads of s. 92—the concluding words of the judgment show that—and it is submitted that to that extent *Russell's* case is wrong: *Att.-Gen. for Ontario v. Att.-Gen. for the Dominion* (5). [Relevant passages in the authorities were reviewed.] Traffic in the sale of liquor in a province as a subject-matter of legislation is exclusively within provincial jurisdiction, and in each of the provinces in Canada there is now either total prohibition or government control whereby the traffic is regulated suitably to the needs of the province. When

(1) [1925] A. C. 396.

(2) 7 App. Cas. 829.

(3) [1892] A. C. 644, 654.

(4) [1929] A. C. 242, 252.

(5) [1896] A. C. 348.

emergency legislation is brought into question it must be shown affirmatively that the emergency continues.

C. R. Magone K.C. (of the Canadian Bar) for the Attorneys-General for Alberta and New Brunswick, interveners. I am asked to say that the provinces of Nova Scotia and Saskatchewan support this argument. I adopt the argument for the Attorney-General for Ontario. The reason given in *Russell's* case (1) that the legislation there was meant to apply to an evil which was assumed to exist throughout the Dominion was not entirely accurate, because at that date the Act did not apply throughout the Dominion, and it is submitted that the Board would have come to a different conclusion had they been informed of what the position was under the Canada Temperance Act. From the note to *Molson v. Lambe* (2) it can only be assumed that the Board at that time had come to the conclusion that there was some doubt about *Russell's* case (1). If the preamble to the Act of 1878 had appeared in the 1927 revision it would not have been an accurate description of that Act because of the changes that had been made. Assuming that there was originally an emergency, at some time between 1878 and 1927 it had completely disappeared, or the conditions had changed to such an extent, either geographically or otherwise, that when the Dominion legislated again on the same subject it should have made a declaration that it was legislating in an emergency if it desired to pass a new Canada Temperance Act. In the absence of some evidence that there was an emergency the Act that was passed was ultra vires because it was in relation to a matter in a class of subject which is enumerated in s. 92.

Geoffrion K.C. (of the Canadian Bar) for the respondent the Attorney-General for Canada. The rule of stare decisis should be applied, and in that respect, apart from the judgments that have been read, there are a number of others where *Russell v. The Queen* (1) has been cited as a subsisting authority supporting some proposition : *Att.-Gen. for Ontario v. Reciprocal Insurers* (3) ; *Gallagher v. Lynn* (4) ; *Shannon v. Lower Mainland Dairy Products Board* (5) ; *Att.-Gen. for Alberta v. Att.-Gen. for Canada* (6) and *King-Emperor v. Benoari Lal Sarma* (7).

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(1) 7 App. Cas. 829.
(2) (1888) 4 Cartwright's cases
on the B. N. A. Act, 1867, at
p. 342.
(3) [1924] A. C. 328, 338.

(4) [1937] A. C. 863, 870.
(5) [1938] A. C. 708, 719-20.
(6) [1939] A. C. 117, 129.
(7) [1945] A. C. 14, 24.

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The whole argument for the appellants that *Russell's* case (1) was wrongly decided is based on inferences drawn from certain judgments, but an extraordinary feature is that the judgments from which they draw them say that it was rightly decided. It is not a question of overruling *Russell's* case (1), but of reversing it, and if that is to be done the whole matter should be reopened. There is the same controversy about "trade and commerce" and so on; in other words, the slate must be wiped clean and a start made again to rebuild a new jurisdiction on the constitution. [Reference was made to *Att.-Gen. for Ontario v. Att.-Gen. for the Dominion* (2), *Att.-Gen. for Manitoba v. Manitoba Licence Holders' Association* (3) and *In re The Regulation and Control of Aeronautics in Canada* (4).] If the emergency question has to be dealt with, the idea that any emergency has disappeared is challenged; two judges below expressly say that the circumstances have not changed, and there is no evidence that they have. There is a heavy burden on the appellants to show that the power in 1927, if it was exercised then, had become unjustifiable by a change of circumstances subsequent to the earlier Act. On the analogy of *In re The Initiative and Referendum Act* (5) there is a big difficulty in claiming this to be a new law. The judgment of the Board in *Att.-Gen. for Ontario v. Att.-Gen. for the Dominion* (2) settles the point that it is not new legislation, for the re-enactment in 1886 was in 1896 held to be governed by *Russell's* case (1), and the provisions are the same here. Some heading must be found to justify the Act, and if the Board think that "peace, order and good government" should be eliminated—this respondent is satisfied with that heading—"criminal law" and "trade and commerce" are suggested as possible alternative headings. If the door is opened, it should be opened wide and the matter investigated. "Peace, order and good government" is preferred because it is logical that a long line of decisions should not be reversed. The heads of "criminal law" and "trade and commerce" have recently been widened by the Board in *Att.-Gen. for British Columbia v. Att.-Gen. for Canada* (6) and *Proprietary Articles Trade Association v. Att.-Gen. for Canada* (7). Lastly, it is submitted that the Act does not depend on temporary conditions, but if it does,

(1) 7 App. Cas. 829.

(2) [1896] A. C. 348, 356.

(3) [1902] A. C. 73.

(4) [1932] A. C. 54, 71-2.

(5) [1919] A. C. 935.

(6) [1937] A. C. 368.

(7) [1931] A. C. 310, 326.

the burden is on the appellants to show that they no longer exist.

A. T. Whitehead (of the Canadian Bar) for various Temperance Federations. I adopt the argument for the Attorney-General for Canada, and submit that the principle of stare decisis as found in four of the judgments below in this case should be applied, and that *Russell's* case (1), which has never been reversed or overruled, and has stood since 1882, should be held to have been properly decided. [In support of that contention reference was made to a number of the cases cited above, including *Shannon v. Lower Mainland Dairy Products Board* (2), *Att.-Gen. for Alberta v. Att.-Gen. for Canada* (3) and *King-Emperor v. Benoari Lal Sarma* (4).] Further, there are many cases in Canada in which prosecutions have taken place and fines have been paid in respect of breaches of the Canada Temperance Act. That Act in its true aspect was intra vires the Dominion Parliament; the tests set out in the line of cases and finalized in the judgment of Duff C.J. in the *National Products Marketing Act* case (5) should be accepted, and the dictum in the *Fort Frances* case (6) should be adopted—that the Dominion Parliament, which represents the people as a whole, must be deemed to be left with considerable freedom of judgment. Lastly, the question is not merely academic, but is of vital practical moment to large groups of people in Canada. [Reference was made to *Reference re Operation of Canada Temperance Act in Counties of Perth, Huron and Peel in Province of Ontario* (7).]

Sir Cyril Radcliffe K.C. replied. It is said for the Attorney-General for Canada that the whole of the argument for the appellants relies on inferences drawn from cases which had themselves accepted *Russell's* case (1). That general statement cannot be accepted without asking what was the nature of the acceptance in each case; there are acceptances which admit of welcome, others which admit of recognition, and some which are no more than a rather quizzical toleration. It is impossible to read the references made by this Board to *Russell's* case (1) without seeing how very guarded the language of the acceptance is in each case. [Reference was made to extracts from a number of authorities to support that view.] The difficulty

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(1) 7 App. Cas. 829.

(2) [1938] A. C. 708.

(3) [1939] A. C. 117.

(4) [1945] A. C. 14.

(5) [1936] S. C. R. (Can.) 398.

(6) [1923] A. C. 695.

(7) [1935] S. C. R. (Can.) 494.

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of the decision in *Russell's* case (1) is that inconsistent expressions of its grounds have been given by the Board. As to stare decisis, *Russell's* case (1) is a decision which has never been applied, and it has had the ground cut from under its feet. If the Board think that it is not a good decision, the appeal should not be rejected because, although it is an inadequate decision, it contains an error that is too ancient to rectify.

1946. Jan. 21. The judgment of their Lordships was delivered by VISCOUNT SIMON. On June 1, 1939, the Lieutenant-Governor of Ontario in Council referred to the Supreme Court of Ontario under the provisions of the Constitutional Questions Act, R.S.O., c. 130, the following question: "Are Parts I., II. and III. of the Canada Temperance Act, R.S.C. 1927, c. 196, constitutionally valid in whole or in part, and if in part, in what respect?" On September 26, 1939, the Supreme Court by a majority (Riddell, Fisher, McTague and Gillanders JJ.A.) answered the question as follows: "This court is of opinion (Henderson J. dissenting) that Parts I., II. and III. of the Canada Temperance Act, R.S.C. 1927, c. 196, are within the legislative competence of the Parliament of Canada." Against this judgment the Attorney-General for Ontario and the Moderation League of Ontario have appealed to the Judicial Committee, and their appeal has been supported by the Attorneys-General for Alberta and New Brunswick, who were admitted as interveners and were represented on the hearing. The appeal was opposed by counsel appearing for the Attorney-General for Canada and for several Temperance Federations.

The object of the appeal is to challenge the decision of this Board in the case of *Russell v. The Queen* (1), or at any rate to deny its applicability to the Act now in question. The majority of the Supreme Court held that that decision governed the present case and obliged it to answer the question referred to it in the affirmative. The statute which was declared to be within the legislative competence of the Dominion Parliament in *Russell's* case (1) was the Canada Temperance Act, 1878. That Act has been amended from time to time by the Dominion Parliament, and has been revised and re-enacted in a consolidated form on more than one occasion under the provisions of the Acts relating to the revision of Statutes of Canada. The

(1) 7 App. Cas. 829.

last revision took place in 1927 under the provisions of the Dominion Act, 1924 (14 & 15 Geo. 5, c. 65) and now appears on the Statute Roll as the Canada Temperance Act, R.S.C. of 1927, c. 196. The material provisions of the Act of 1927 are admittedly identical with those of the Act of 1878.

The object of the Act of 1878 was to authorize the adoption of a system of local option in regard to the sale of intoxicating liquor in counties and cities throughout the Dominion. By Part I. elaborate provisions are made for bringing the Act into force within the area of any county or city. Following on a petition to the Governor-General in Council supported by a certain proportion of the electors in the area, a poll is to be taken, and if a majority supports the petition an Order in Council is passed bringing the Act into effect in that area for a minimum of three years. Amendments have from time to time been passed dealing with portions of the Dominion which were not divided into counties and substituting electoral districts as the area in such cases, but it is unnecessary to set these out in detail. Part II. prohibits the sale of liquors in the areas in which the Act is brought into force, and Part III. provides for prosecution and penalties, which in some cases are severe, for breaches of the Act.

The Act having been passed in 1878, its constitutional validity was challenged in 1882 in *Russell's* case (1), which arose out of a conviction of the appellant Russell for unlawfully selling intoxicating liquor contrary to the provisions of Part II. of the Act. It was argued in that case that the Act was ultra vires of the Dominion Parliament on the ground that the matter was one which fell within s. 92 of the British North America Act and was therefore within the exclusive jurisdiction of the provincial legislatures. The Board, however, held that the Act did not deal with any of the matters exclusively reserved to the provinces and upheld the validity of the statute on the ground that it related to the peace, order and good government of Canada. This decision has stood unreversed for sixty-three years. More than that, it has received the express approval of the Board in subsequent cases. A notable instance is to be found in *Att.-Gen. for Ontario v. Att.-Gen. for the Dominion* (2). In that case Lord Watson, in delivering the judgment of the Board, said: "The judgment of this Board in *Russell v. The Queen* (1) "has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates

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“ to the peace, order and good government of Canada in such
 “ sense as to bring its provisions within the competency of the
 “ Canadian Parliament (1).” After pointing out that the provisions of the Act of 1878 were in all material respects the same as those embodied in the Act of 1886, which was the statute the Board had then to consider, he continued, “ The reasons which
 “ were assigned for sustaining the validity of the earlier, are,
 “ in their Lordships’ opinion, equally applicable to the later
 “ Act. If therefore appears to them that the decision in *Russell*
 “ v. *The Queen* (2) must be accepted as an authority to the extent
 “ to which it goes, namely, that the restrictive provisions of the
 “ Act of 1886, when they have been duly brought into operation
 “ in any provincial area within the Dominion, must receive
 “ effect as valid enactments relating to the peace, order and
 “ good government of Canada (1).” In 1883, in the earlier case of *Hodge v. The Queen* (3), the Judicial Committee had referred to *Russell’s* case (2) without any indication of disapproval, nor is any to be found in the judgment of Lord Macnaghten in *Att.-Gen. for Manitoba v. Manitoba Licence Holders’ Association* (4), where the decisions of 1882 and of 1896 were contrasted. In many subsequent cases the case has been cited in judgments of the Board ; it will be enough to mention *Att.-Gen. for Canada v. Att.-Gen. for Alberta* (The Insurers case) (5), the *Board of Commerce Act* case (6), and *King-Emperor v. Benoari Lal Sarma* (7). It was also quoted as an authority by Lord Atkin in his speech in the House of Lords in *Gallagher v. Lynn* (8), a case relating to the legislative powers of the Parliament of Northern Ireland.

But in 1925 *Russell’s* case (2) was commented on in a judgment of the Judicial Committee delivered by Lord Haldane in *Toronto Electric Commissioners v. Snider* (9), and it is on this comment that the present appellants largely rely in support of their contention that it was wrongly decided. After contrasting that case with other decisions of the Board already mentioned above, Lord Haldane said : “ It appears to their
 “ Lordships that it is not now open to them to treat *Russell v.*
 “ *The Queen* (2) as having established the general principle
 “ that the mere fact that Dominion legislation is for the general

(1) [1896] A. C. 362.

(2) 7 App. Cas. 829.

(3) 9 App. Cas. 117.

(4) [1902] A. C. 73.

(5) [1916] 1 A. C. 588.

(6) [1922] 1 A. C. 191.

(7) [1945] A. C. 14.

(8) [1937] A. C. 863.

(9) [1925] A. C. 396.

“ advantage of Canada, or is such that it will meet a mere want
 “ which is felt throughout the Dominion, renders it competent
 “ if it cannot be brought within the heads enumerated speci-
 “ fically in s. 91. . . . No doubt there may be cases arising
 “ out of some extraordinary peril to the national life of Canada,
 “ as a whole, such as the cases arising out of a war, where
 “ legislation is required of an order that passes beyond the
 “ heads of exclusive Provincial competency ” (1). And later
 he said “ Their Lordships think that the decision in *Russell v.*
The Queen (2) can only be supported to-day, not on the footing
 “ of having laid down an interpretation, such as has sometimes
 “ been invoked, of the general words at the beginning of s. 91,
 “ but on the assumption of the Board, apparently made at the
 “ time of deciding the case of *Russell v. The Queen* (2), that the
 “ evil of intemperance at that time amounted in Canada to
 “ one so great and so general that at least for the period it was a
 “ menace to the national life of Canada so serious and pressing
 “ that the National Parliament was called on to intervene to
 “ protect the nation from disaster. An epidemic of pestilence
 “ might conceivably have been regarded as analogous ” (1).

The first observation which their Lordships would make on this explanation of *Russell's* case (2) is that the British North America Act nowhere gives power to the Dominion Parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the provincial legislatures merely because of the existence of an emergency. Secondly, they can find nothing in the judgment of the Board in 1882 which suggests that it proceeded on the ground of emergency ; there was certainly no evidence before that Board that one existed. The Act of 1878 was a permanent, not a temporary, Act, and no objection was raised to it on that account. In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case (3) and the *Radio* case (4)), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances ; so, too, may be

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(1) [1925] A. C. 412.

(2) 7 App. Cas. 829.

(3) [1932] A. C. 54.

(4) [1932] A. C. 304.

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the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen* (1), Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.

It is to be noticed that the Board in *Snider's* case (2) nowhere said that *Russell v. The Queen* (1) was wrongly decided. What it did was to put forward an explanation of what it considered was the ground of the decision, but in their Lordships' opinion the explanation is too narrowly expressed. True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.

The appellants' first contention is that *Russell's* case (1) was wrongly decided and ought to be overruled. Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects. In the present case the decision now sought to be overruled has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered. Time and again the occasion has arisen when the Board could have overruled the decision had it thought it wrong. Accordingly, in the opinion of their Lordships, the decision must be regarded as firmly embedded in the constitutional law of Canada, and it is impossible now to depart from it. Their Lordships have no intention, in deciding the present appeal, of embarking on a fresh disquisition as to relations between ss. 91 and 92 of the British North America Act, which have been expounded in so many reported cases; so far as the Canada Temperance

(1) 7 App. Cas. 829.

(2) [1925] A. C. 396.

Act, 1878, is concerned the question must be considered as settled once and for all.

The second contention of the appellants was that in 1927, when the statute now in force was enacted, there were no circumstances which enabled the Parliament of the Dominion to legislate anew. As has already been said, the Act of 1927 is, in all respects material for this appeal, identical in its terms with the Act of 1878, and also with the Act of 1886, which itself was a revised edition of 1878 and was the Act in force in 1896 when the case of *Att.-Gen. for Ontario v. Att.-Gen. for the Dominion* (1) was heard. It was not contended that if the Act of 1878 was valid when it was enacted it would have become invalid later on by a change of circumstances, but it was submitted that as that Act and the Act of 1886 have been repealed, the Act of 1927 was new legislation and consequently circumstances must exist in 1927 to support the new Act. Then it was said (and this, apparently, was the opinion of Henderson J.A., who dissented from the other members of the Supreme Court of Ontario) that no circumstances could exist in 1927 to support the Act, in view of the legislation that had been passed in the provinces, including Ontario, for the regulation of the liquor traffic. Their Lordships do not find it necessary to consider the true effect either of s. 5 or s. 8 of the Act of 1924 for the revision of the Statutes of Canada, for they cannot agree that if the Act of 1878 was constitutionally within the powers of the Dominion Parliament it could be successfully contended that the Act of 1927 which replaced it was ultra vires. The same ground is not covered by provincial legislation setting up a licensing system and making the sale of liquor a government monopoly. Moreover, if the subject-matter of the legislation is such that it comes within the province of the Dominion Parliament that legislature must, as it seems to their Lordships, have power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed to necessitate the earlier statute. To legislate for prevention appears to be on the same basis as legislation for cure. A pestilence has been given as an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if the Parliament could legislate when there was an actual epidemic it could do so to prevent one occurring

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and also to prevent it happening again. Once it has been decided that the Act of 1878 was constitutionally valid, it follows that an Act which replaces it and consolidates therewith the various amending Acts that have from time to time been enacted must be equally valid. It is to be noted that in 1896 Lord Watson's judgment (1) appears to take it for granted that the position was in no way affected by the fact that the Act of 1878 had been repealed and replaced by the Act of 1886.

Accordingly, their Lordships are not prepared to hold either that *Russell v. The Queen* (2) was wrongly decided or that it has ceased to be a binding authority by reason that the Act of 1878 has been re-enacted in 1927. It is by repeal by the Dominion Legislature, and not by appeal to the Judicial Committee, that the enactment might cease to be effective. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. There should be no costs awarded in respect of the appeal.

Solicitors for the appellants and the interveners: *Blake & Redden*.

Solicitors for the respondents: *Charles Russell & Co.*

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ABDUL HAMEED SITTI KADIJA AND

ANOTHER APPELLANTS ;

AND

DE SARAM AND OTHERS RESPONDENTS
ON APPEAL FROM THE SUPREME COURT OF THE ISLAND
OF CEYLON.

*Ceylon—Will—Fidei commissum—Mortgage—Differences between trusts
and fidei commissa.*

A testator by his will provided, inter alia, as follows: "I do
" hereby will and desire that my wife and my children
" and my father who are the lawful heirs and
" heiresses of my estate shall be entitled to and take their respective

* *Present*: VISCOUNT SIMON, LORD THANKERTON and SIR JOHN
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" shares according to my religion and Shafie sect—to which I
 " belong, but they nor their heirs shall not sell, mortgage or
 " alienate any of the lands, houses, estates or gardens belonging to
 " me at present or which I might acquire hereafter, and they shall
 " be held in trust for the grandchildren of my children and the
 " grandchildren of my heirs and heiresses only that they may
 " receive the rents income and produce of the said lands, houses,
 " gardens and estates without encumbering them in any way or the
 " same may be liable to be seized attached or taken for any of their
 " debts or liabilities, and out of such income, produce and rents,
 " after defraying expense for their subsistence, and maintenance
 " of their families the rest shall be placed or deposited in a safe
 " place by each of the party, and out of such surplus lands should
 " be purchased by them for the benefit and use of their children
 " and grandchildren as hereinbefore stated, but neither the execu-
 " tors herein named or any Court of Justice shall require to receive
 " them or ask for accounts at any time or under any circumstances,
 " except at times of their minority or lunacy " :—

Held, that a valid fidei commissum was created by the will, and that accordingly the father of the appellants, one of the testator's children, had no interest in his share of the property which he was capable of mortgaging except an interest which terminated on his death.

The will was not an attempt to create a trust as known to the law of England, its leading clauses being typical of a fidei commissum and inconsistent with the structure of an English trust: The main differences between fidei commissum and English trusts are correctly set out in R. W. Lee's Introduction to Roman-Dutch Law, 3rd ed., at p. 372.

General rules of construction of fidei commissum considered and applied.

Decree of the Supreme Court of Ceylon (1944) 45 C. N. L. R. 265, set aside.

APPEAL (No. 39 of 1945) from a judgment and decree of the Supreme Court of Ceylon (May 26, 1944) reversing a judgment and decree of the District Court of Colombo (March 23, 1942).

The following facts are taken from the judgment of the Judicial Committee. This appeal arose out of an action of ejection by the first two respondents against the appellants and the other four respondents. The action was dismissed by a judgment and decree of the District Court of Colombo, which were set aside by a judgment and decree of the Supreme Court of the Island of Ceylon, whereby decree of ejection and for damages were granted in favour of the first two respondents, by a majority of three judges to two.

The question at issue arose on the proper construction of the will, dated December 12, 1872, of one Isboe Lebbe Idroos

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Marikar, who died on May 8, 1876, and whose said will was admitted to probate on May 29, 1876. The relevant portions of the will, which was written in English, were as follows :—

“ I do hereby will and desire that my wife Assena Natchia, daughter of Seka Marikar, and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Slema Lebbe, Abdul Ryhiman, Mchamadoe Usboe, Amsa Natchia and Savia Umma, and my father Uduma Lebbe Usboe Lebbe, who are the lawful heirs and heiresses of my estate shall be entitled to and take their respective shares according to my religion and Shafie sect—to which I belong, but they nor their heirs shall not sell, mortgage or alienate any of the lands, houses estates or gardens belonging to me at present or which I might acquire hereafter, and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only that they may receive the rents income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized attached or taken for any of their debts or liabilities, and out of such income, produce and rents, after defraying expense for their subsistence, and maintenance of their families the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated, but neither the executors herein named or any Court of Justice shall require to receive them or ask for accounts at any time or under any circumstances, except at times of their minority or lunacy.

“ I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along with the executors herein named three competent and respectable persons of my class and get the movable and immovable properties of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions.”

The testator was survived by his widow and the seven children named in the will ; his father had predeceased him, but an eighth son, Abdul Hameed, had been born after the date of the will, and also survived the testator. The parties agreed that the case should proceed on the footing that the will applied to

Abdul Hameed, as if he had been named by the testator along with his other children in the will. The movable and immovable estates of the testator were duly divided as directed in the last clause of the will, and by deed dated February 19, 1878, the then surviving executor conveyed to Abdul Hameed, subject to the trusts and conditions of the will, which were repeated verbatim in the deed, the properties which were the subject-matter of the present suit, as Abdul Hameed's share of the immovable properties of the testator. Abdul Hameed died on July 20, 1931, and the appellants were the only two of his children who survived. The third, fourth, fifth and sixth respondents were grandchildren of Abdul Hameed, children of a deceased sister of the appellants.

On May 15, 1931, Abdul Hameed had executed a mortgage of the properties now in suit in favour of one Peter de Saram in consideration of a loan of Rs.30,000. Peter de Saram subsequently brought an action on the mortgage in the District Court of Colombo against the legal representative of Abdul Hameed, and, on Peter de Saram's death on or about April 23, 1937, the present first two respondents continued the action as substituted plaintiffs, and on November 26, 1937, the court entered a hypothecary decree in their favour. At the sale pursuant thereto the property was bought by the first two respondents, and a conveyance was executed in their favour by the secretary of the District Court on July 7, 1938. Their right to possession of the property having been disputed by the descendants of Abdul Hameed on the ground that it was the subject of a fidei commissum under the will of the testator, and that Abdul Hameed had no interest in the property which he was capable of mortgaging except an interest which terminated on his death, the first two respondents instituted the present action on January 30, 1941, for a declaration that they were entitled to the property in suit, for decree of ejection and for damages.

The District Judge held that he was bound by three earlier decisions of the Supreme Court of Ceylon in which this same will had been interpreted as creating a valid fidei commissum, and he dismissed the action. An appeal to the Supreme Court (Howard C.J., Soertsz and Hearne JJ., Keuneman and Wijeyewardene JJ. dissenting) was allowed.

1945. Nov. 22, 26. *Pritt K.C.* and *Stephen Chapman* for the appellants. In all cases relating to fidei commissa the first

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and fundamental question is whether the testator or donor was actuated by an intention to secure a second interest by the imposition of conditions on the dominium of the immediate devisee or donee. There is, no doubt, a leaning in favour of dispositions being unfettered, but once the intention to impose a fetter is made manifest, either by the words used or by necessary implication, this intention has to be fulfilled. There then arises a second and entirely separate question, whether the intention is so fraught with ambiguity and doubt in its detailed application that it cannot be fulfilled. In this part of the inquiry courts should not, it is submitted, be astute to find means to avoid fulfilling the intention; difficulties of construction should be faced squarely and decided one way or the other, and a construction which is capable of fulfilling the intention should be given preference over one which defeats it, always assuming that it is a construction which the instrument when read as a whole is capable of bearing. Here the testator made clear an intention to impose a fidei commissum on the property in question, and as between constructions tending to fulfil this intention and constructions tending to defeat it, the former should prevail. [On the nature of a fidei commissum reference was made to Van Leeuwen's *Roman-Dutch Law*, 2nd ed., at pp. 375-6.] It is submitted that the testator succeeded in making clear an intention (a) to prevent the immediate devisees from alienating or charging their shares of the estate; (b) to secure that ultimately the grandchildren of the immediate devisees should receive the respective shares; and (c) that in between the immediate devisees' interest and the interest of the grandchildren there should be an interest for the children. A fidei commissum which is clearly shown to have been intended by a testator is not liable to be rendered null save where insuperable doubt or ambiguity arises in ascertaining its details, and no such doubt or ambiguity exists in the present case if the will is construed in a manner calculated to fulfil rather than defeat the general intentions. [Reference was made to four Ceylon cases in which the present will had been considered, the first three of which held that the testator had created a valid fidei commissum, the last doubting the correctness of those decisions: *Sabapathy v. Yusoof* (1); *Saleem v. Mutturamen Chetty* (2); *Sinnan Chettiar v. Mohideen* (3); and *Ramanathan v. Saleem* (4).] It was also said in *Noordeen*

(1) (1935) 37 C. N. L. R. 70.

(2) (1938) 15 Cey. L. W. 115.

(3) (1939) 41 C. N. L. R. 225.

(4) (1940) 42 C. N. L. R. 80.

v. *Badurdeen and Others* (1)—a Privy Council decision—that “Difficulty of construction alone would not prevent the creation of a fidei commissum. To bring about that result doubt is required, either as to whether such a condition has been created or who are the recipients of the bounty.”

Le Quesne K.C. and *Handoo* for respondents Nos. 1 and 2, made a close analysis of the words of the will with the object of showing that so much was left vague that, even assuming that there was an intention to create a fidei commissum, the attempt had failed. One is confronted over and over again with such a possible variety of meanings that in the end it becomes impossible to pronounce definitely for any meaning at all. It is submitted that in so far as *Sabapathy v. Yusoof* (2), *Saleem v. Mutturamen* (3) and *Sinnan Chettiar v. Mohideen* (4) purport to decide that the will creates a valid and effective fidei commissum they must be considered to have been wrongly decided. On any reasonable interpretation of the will it cannot be said that its terms indicate an intention on the part of the testator to create a fidei commissum, and the terms do not suffice in any event to create a valid fidei commissum. Where serious doubts arise on the interpretation of provisions which are alleged to create a fidei commissum the courts rightly lean against the imposition of any burden on the inheritance. If they amount to any known legal disposition of property at all, the terms of the will contemplate something in the nature of a trust rather than of a fidei commissum, and such trust is void on the ground, inter alia, that it contravenes the rule against perpetuities. If the will is construed as purporting to constitute either a fidei commissum or a trust, it is impossible to give effect to such dispositions and they are void by reason of uncertainties on these matters, inter alia, namely, the ascertainment of the beneficiaries (*Craib v. Loku Appu* (5)), and the time of the vesting of their interests, and, whether the will be construed as a fidei commissum or as a trust, it is impossible to be sure that the rights resulting from either of such constructions are what the testator intended. [Reference was made to *Laws of Ceylon*, 2nd ed., at p. 451, by Walter Pereira, and to *Institutes of Holland*, 2nd ed., ch. IX., s. 8, p. 62, by J. Van Der Linden.] It is an indication that we are outside the region of a fidei commissum when the testator is doing something

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(1) (1944) 45 C. N. L. R. 203,
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(3) (1938) 15 Cey. L. W. 115.

(4) (1939) 41 C. N. L. R. 225.

(2) (1935) 37 C. N. L. R. 70.

(5) (1918) 20 C. N. L. R. 449, 457.

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which one would not normally, at any rate, associate with the creation of a fidei commissum ; and the provision here for the investment of certain surplus could not be enforced against a fiduciary ; it could be enforced if you are dealing with a trust. The matter of accounts is another thing pointing rather to a trust than a fidei commissum. In the result, the findings of the majority of the judges of the Supreme Court are correct.

Pritt K.C. replied.

1946. Jan. 21. The judgment of their Lordships was delivered by LORD THANKERTON, who stated the facts and the terms of the will set out above and continued : The main question in the appeal is whether under the will a valid fidei commissum of the property in suit was created, which disabled Abdul Hameed from mortgaging any interest in the property after his death, or whether Abdul Hameed had an absolute interest in the property, which has become vested in the first two respondents by sale. The appellants maintain that a valid fidei commissum was created by the will, which the first two respondents deny, maintaining (a) that the terms of the will do not suffice to create a valid fidei commissum, (b) that the terms of the will, at best, rather contemplate the creation of a trust, which would contravene the rule against perpetuities, than the creation of a fidei commissum, and (c) in any event, that uncertainty as to ascertainment of the beneficiaries and the time of the vesting of their interests renders it impossible to give effect to any fidei commissum.

This particular will has already been the subject of judicial construction in four cases, in the first three of which it was held that it created a valid fidei commissum ; in the fourth case, though it was decided on a different point, *Soertsz J.*, on a review of the previous decisions, found difficulty in agreeing with them, and, if it had been necessary, would have asked for reconsideration of them by a full bench. In the present case, the District Judge, though he appears to have favoured a different view, felt bound by the previous decisions to decide in favour of a fidei commissum. On appeal by the first two respondents, an order was made for a hearing before five judges, and on May 26, 1944, the appeal was allowed by a majority of three judges (*Howard C.J.*, *Soertsz J.* and *Hearne J.*) to two (*Keuneman J.* and *Wijeyewardene J.*), and judgment was entered for the first two respondents. In view of that diversity of opinion, their Lordships find it unnecessary to refer to the four

earlier cases, as Wijeyewardene J. was a party to the decision in the third case, and Soertsz J., as already stated, was the judge in the fourth case, and also because it appears that the terms of the will, as they were submitted to the court in at least the first three cases, included the words " issues or heirs " in the clause prohibiting alienation, and there is no mention of issue in the will as submitted in the present appeal.

Howard C.J. held (a) that there was a doubt whether there was or was not a prohibition in perpetuity against alienation, (b) that there was no certainty with regard to the beneficiaries, the class being too wide for ascertainment and too vaguely described, for which reason alone the learned judge held that it had not been established that the testator intended to create a fidei commissum, and (c) that he agreed with the opinion of Soertsz J. that there was a further difficulty with regard to the time of vesting. Soertsz J. held (a) that there was a failure to designate or indicate sufficiently the recipients of the testator's bounty, and that the attempted fidei commissum failed in limine, (b) that the time of vesting was also wrapped in similar doubt, and (c) that the language of the will rather contemplated a perpetual trust, which would fail because of the rule against perpetuities and also because of the uncertainty as to the beneficiaries and the time of vesting. Hearne J. arrived at the conclusions (a) that it was impossible to hold from the language of the will that the testator intended to create a fidei commissum, (b) that, if he did, he failed to achieve his object, the requisites of a valid fidei commissum not having been satisfactorily set out, (c) that the wording of the will, and the effect of its provisions, strongly suggested an attempt to create a trust, in which attempt, if it was consciously made, the testator failed.

Of the two learned judges who formed the minority, Keuneman J. held (a) that the intention of the testator to create a fidei commissum had been expressed with sufficient clearness, (b) that the will showed an intention to benefit three classes of beneficiaries, namely, the devisees, their children and their grandchildren, that the testator devised the immovable property to the devisees, burdened with a fidei commissum in favour of their children and grandchildren in successive generations; and that the fidei commissum was to become operative on death in each case, and (c) that the interest given to the devisees more closely resembled the interest of a fiduciary as known to the Roman-Dutch law than the interest of a trustee as known

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in England, the occurrence of the word "trust" in the will being inconclusive, and that he was not disposed to accept the argument that the will created a trust as known in England. Lastly, Wijeyewardene J. held that by the opening clauses of the will the plena proprietas was given to the immediate devisees, a prohibition against alienation being then imposed, such burden being in favour of their heir or heirs and grandchildren, the grandchildren being the ultimate beneficiaries, the clause as to the rents income and produce being merely explanatory of the preceding clauses, and that by these clauses a valid fidei commissum was created, there being nothing in the subsequent clauses to prevent the court from holding in favour of a fidei commissum—in particular, the clause as to disposal of the surplus rents, produce and income not being legally binding on the devisees; the learned judge further held that the testator should not be taken to have intended to create an English trust.

The authorities as to the rules of construction which apply to the present question are fully quoted by the learned judges of the Supreme Court, and their Lordships do not find it necessary to repeat them, but the following general principles may be derived from them. In the first place, where there is doubt whether a fidei commissum has been created, that construction should be preferred which will pass the property unburdened, but, if the language of the will is such as to show clearly an intention to create a fidei commissum, mere difficulty of construction will not prevent its being upheld. Doubt as to whether a valid fidei commissum has been created includes such doubt as to the identity of the beneficiaries as will prevent their ascertainment by a court of law. However difficult their application may be in a particular case, these general rules of construction appear to be well established.

In the first place, their Lordships will dispose of the suggestion that the will suggests an attempt on the testator's part to create a trust as known in England. Their Lordships agree with Wijeyewardene J. that the use of the word "trust" in the will is quite inconclusive, as it is as commonly used by writers in relation to fidei commissa, as to the English type of trust. In the opinion of their Lordships the leading clauses of this will are typical of a fidei commissum, and are inconsistent with the structure of an English trust. The main differences between fidei commissa and English trusts are correctly set out, in the opinion of their Lordships, in Professor R. W. Lee's

Introduction to Roman-Dutch Law (3rd ed. 1931) at p. 372, namely, “(1.) the distinction between the legal and the equitable estate is of the essence of the trust; the idea is foreign to the fidei commissum. (2.) In the trust, the legal ownership of the trustee and the equitable ownership of the beneficiary are concurrent, and often co-extensive; in the fidei commissum the ownership of the fidei commissary begins when the ownership of the fiduciary ends. (3.) In the trust, the interest of the beneficiary, though described as an equitable ownership, is properly ‘jus neque in re neque ad rem,’ against the bona fide alienee of the legal estate it is paralysed and ineffectual; in the fidei commissum the fidei commissary, once his interest has vested, has a right which he can make good against all the world, a right which the fiduciary cannot destroy or burden by alienation or by charge.” Professor Lee adds a fourth difference, which is not material here.

In the opinion of their Lordships, the learned judges who formed the majority have not given sufficient weight to the language of the leading clause, under which the testator’s heirs and heiresses according to the Mahomedan law are to be entitled to and to take their respective shares under the law. In the opinion of their Lordships, the terms of the clause, along with the inclusion of the movable estate in the devise, which the devisees take absolutely, point clearly to a devise of the plenum dominium of the immovable estate to the devisees, subject to the restrictions so far as binding under the law of Ceylon, and make clear that there is not any attempt to constitute a trust as known to the law of England, but that there is an attempt to constitute fidei commissa, and the last clause which directs the separate ascertainment, after the death of the testator, of the shares to which the heirs and heiresses are entitled, points to a separate fidei commissum in the case of each devisee. The present case relates to the share of Abdul Hameed, which was so ascertained, and conveyed to him.

In order to ascertain, if possible, who are the fiduciaries and who are the fidei commissaries, it is convenient to read the next two clauses together:—“but they nor their heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens belonging to me at present, or which I might acquire hereafter and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only” One of the learned judges relates the

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final word "only" to the succeeding clause, but, while their Lordships do not think that it matters very much, they take the view that it more naturally qualifies the antecedent clause. Bearing in mind that the Mahomedan law only includes the nearest generation when referring to heirs, their Lordships are clearly of opinion that the words "they nor their heirs" in the clause prohibiting alienation cover two generations only, namely, the devisees and their heirs, and that there is no room for the suggestion that the prohibition may be construed as a perpetual one. In the next clause, the word "they" clearly relates to the immovable property, and the beneficiaries, in the opinion of their Lordships, relate to the third generation in the case of all the devisees, the testator's wife, as well as his children; the fact that the first words "grandchildren of my children" might have been satisfied by the words which follow—"grandchildren of my heirs and heiresses"—does not materially affect the construction of the clause as stated by their Lordships. So far, their Lordships find language in the will apt for the constitution of a valid fidei commissum, and a sufficient statement of the beneficiaries and the benefits to be taken by them.

It is suggested that the succeeding clause as to the rents, income and produce of the immovable property makes it difficult to uphold the creation of a valid fidei commissum, but their Lordships are of opinion that it is not legally binding on the fiduciaries, to whom alone it relates, and is therefore of a precatory nature; in this they agree with the views expressed by Keuneman and Wijeyewardene JJ. As regards the construction of the clause, their Lordships are of opinion (a) that it applies to the devisees and their heirs, who are referred to in the clause which prohibits alienation, (b) that it relates only to surplus rents, income and produce, and to their incumbrance, and (c) that the purchase of the surplus lands "for the benefit" and use of their children and grandchildren as hereinbefore "stated," sufficiently clearly expresses the desire that the surplus lands should be held on the same terms as the original shares of the testator's immovable property were to be held. It is clear on the whole terms of the will that each of the fiduciaries was only to take an interest in his share during his life. The next clause as to a demand for accounts, whether effective or not, cannot affect the valid creation of a fidei commissum.

Finally, their Lordships agree with Wijeyewardene J. that such questions as whether the share held by Abdul Hameed as

fiduciary would pass on his death to his heirs as a joint fidei commissum or as separate fidei commissa, are not destructive of the creation of a valid fidei commissum by the will, but are questions as to devolution of the property which commonly arise for settlement by the court on the proper construction of the will. Their Lordships agree with the reasoning of the learned judge on this point.

It follows that in the opinion of their Lordships Abdul Hameed took his share of the immovable property subject to a valid fidei commissum, and that, accordingly, Abdul Hameed could not mortgage any interest in the property after his death, and that the first and second respondents' suit fails and should be dismissed. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the Supreme Court should be set aside, and that the judgment and decree of the District Court should be restored. The first and second respondents will pay the appellants' costs of the appeal and their costs before the Supreme Court.

Solicitors for appellants : *Freeman & Cooke.*

Solicitors for respondents Nos. 1 and 2 : *Burchells.*

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SCHERING LIMITED APPELLANTS

AND

STOCKHOLMS ENSKILDA BANK
AKTIEBOLAG AND OTHERS RESPONDENTS.

1945

June 18, 19,
20, 21, 25,
26, 27;
Nov. 29.

Contract—Illegality—Abrogation—Outbreak of war—Intercourse with, or benefit to, the enemy—Purchase of reichsmarks by German company from Swedish bank—Repayment of debt by British company by instalments in consideration of assignment by Swedish bank of like amount of German company's debt.

By a contract made in February, 1936, a German company agreed to purchase from a Swedish bank reichsmarks to the value

* *Present:* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD PORTER and LORD GODDARD.

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84,000*l.*, payment therefor to be postponed for eight years, and an English company, a subsidiary of the German company, as surety guaranteed the payment of 50,400*l.*, agreeing to pay the bank this sum by half-yearly instalments over a period of eight years, at the same time acquiring the right to an assignment of the bank's right against the German company, whose liability to pay 84,000*l.* was to be discharged in the event of the 50,400*l.* being paid. By a further contract, dated April 16, 1936, entered into with the Swedish bank, the English company again guaranteed the debt and undertook to pay the instalments. It was provided that the guarantee and agreement therein contained were made in accordance with the laws of England. By another document of the same date the English company created a security for the performance of its contract. A number of instalments had been paid before the outbreak of war with Germany :—

Held (per Lord Thankerton, Lord Porter and Lord Goddard, Lord Russell of Killowen and Lord Macmillan dissenting), that, on the true construction of the documents, the respondent bank having fully performed their obligations to the German company before the outbreak of war, nothing remained to be done under the contract, which was one between an English company and a neutral, but to discharge an accrued debt by instalments; accordingly, since war does not abrogate or discharge a debt incurred before the declaration, the obligation to pay and the right to recover were only suspended.

Ertel Bieber & Co. v. Rio Tinto Co., Ltd. [1918] A. C. 260, applied
Decision of the Court of Appeal [1944] Ch. 13, affirmed.

APPEAL from the Court of Appeal.

The appellant company (hereinafter called "the English company") was registered in England. Substantially the whole of its issued share capital was at all material times held by or on behalf of Schering-Kahlbaum Aktiengesellschaft of Berlin, the parent company (hereinafter called "the German company"). The German company was also the parent company of Schering-Kahlbaum (India), Ltd., subsequently Schering (India), Ltd., registered under the laws of India and carrying on business in Bombay, (hereinafter called "the Indian company"). The English company and the Indian company dealt in drugs and chemicals manufactured by the German company. Stockholms Enskilda Bank Aktiebolag (hereinafter called "the Swedish bank") was a Swedish company registered under the laws of Sweden and at all material times carried on the business of bankers at Stockholm. In the financial transaction hereinafter referred to it acted on behalf of a syndicate as well as on its own behalf. In 1935 it possessed

1,000,000 reichsmarks, the sterling value of which at the current rate of exchange prescribed by the German authorities was 84,000*l.* It was willing to sell them for 50,400*l.* and the German company was willing to acquire them at that price but it was prevented by the German foreign exchange regulations from providing the necessary sum of sterling from its own resources. The German company was negotiating with the respondent bank for the purchase on the footing (1.) that the reichsmarks should be made available for the German company by way of a sperrmark credit, sperrmarks being reichsmarks spendable only in Germany ; (2.) that payment be made by the English company and the Indian company paying 50,400*l.* in sterling to the respondent bank by agreed instalments ; (3.) that these two companies should provide security for the due payment of 50 per cent. of the sum of 50,400*l.* and (4.) that they should set off their payments against their liability to the German company for goods supplied. On November 5, 1935, Arthur William Edwards, managing director of the English company, wrote to one Schuder, acting for the Indian company :

“ . . . As you know, there exist in Germany large amounts
 “ of sperrmarks held by foreigners Schering-Kahlbaum
 “ A. G., Berlin, are planning to take over from a foreign group
 “ such a sperrmark credit of one million reichsmark. Repay-
 “ ment is to be made not by Schering-Kahlbaum A. G.
 “ Berlin themselves but by the foreign companies connected
 “ with Schering-Kahlbaum A. G. As, on the one hand, the
 “ foreign financiers are interested in converting at the present
 “ rate of exchange their claim to reichsmarks in Germany
 “ into a claim to foreign exchange outside Germany, and, on the
 “ other hand, due to the depreciation of their own currency,
 “ are in a position to allow a considerable discount, there is a
 “ favourable opportunity for Schering-Kahlbaum A. G. that
 “ this credit is repaid by the foreign Schering companies with
 “ only 60 per cent. in values. Also this repayment is to be
 “ distributed over eight years Schering-Kahlbaum A. G.
 “ receive one million reichsmarks free of interest, and the
 “ foreign companies—Schering Bombay and my company—
 “ together pay back in total the equivalent of 600,000
 “ reichsmarks We must assume that, in as far as our
 “ liability as principal debtor is claimed and in as far as we make
 “ repayment, we can set off these payments against our debts to
 “ Berlin Also it is provided that the foreign group
 “ receives from you and us securities in the form of goods

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H. L. (E.) " (possibly also outstanding debts) at terms to be agreed upon
 1945 " (together 50 per cent. of the claim in values outstanding at the
 SCHERING " time, i.e., at the beginning of the transaction 300,000 reichs-
 LD. " marks) As you will see from the above, this is an
 v. " extremely interesting business for Berlin " The
 STOCKHOLMS following is a translation from the German language of a contract
 ENSKILDA (hereinafter called " the February contract "), dated February
 BANK 24 and 28, 1936, and headed " Contract of Debt " :
 AKTIE- " Between the Stockholms Enskilda Bank Aktiebolag,
 BOLAG. " Stockholm as creditor, of the one part and the
 " Schering-Kahlbaum Aktiengesellschaft Berlin as
 " debtors of the other part and also Schering, Ltd., London, and
 " Schering-Kahlbaum (India), Ltd., Bombay, hereinafter called
 " the sureties, as sureties, the following contract of debt is
 " concluded : Clause 1. The Enskilda will, at latest one month
 " after the coming into operation of the contract, place at the
 " disposal of Schering an amount in reichsmarks to the amount
 " of the equivalent of 84,000*l.* sterling For the con-
 " version of the reichsmarks the official medium rate of
 " exchange for payment in London on the working day
 " preceding the paying out shall apply Clause 2. In
 " respect of the placing at disposal of the amount specified in
 " cl. 1 Schering shall be indebted to the Enskilda in a sum
 " amounting to 50,400*l.* free of interest. The debt shall fall
 " due on the expiry of eight years reckoned from the day of
 " paying out, and is to be repaid by Schering without further
 " notice on the due date in effective pounds sterling, unless the
 " foreign exchange enactments then in force constitute a
 " hindrance to this. If, in accordance with the said enact-
 " ments, the amount is required to be paid into a blocked
 " account, the amount in foreign currency may only be paid in
 " reichsmarks converted on the basis of the official Berlin
 " medium rate of exchange for paying out in London.
 " Clause 3. For the debts the sureties constitute themselves
 " surety jointly and severally as principals to the amount of
 " 50,400*l.*, with the proviso that, against the liability as sureties
 " all payments must be set off which the Enskilda have received
 " from the sureties or one of the sureties or from the principal
 " debtor or from third persons for account of the sureties or of
 " the principal debtor, in respect of the loan. Clause 4. The
 " sureties will acquire from the Enskilda its claims against
 " Schering by instalments, with the proviso that they shall
 " pay to Enskilda

" 1½ years after day of paying over of the loan	6,300l.	H. L. (E.)
" 2 " " "	6,300l.	1945
" 2½ " " "	6,300l.	—
" 3 " " "	6,300l.	SCHERING
" 3½ " " "	3,360l.	L.D.
" 4 " " "	3,360l.	v.
" 4½ " " "	2,940l.	STOCKHOLMS
" 5 " " "	2,940l.	ENSKILDA
" 5½ " " "	2,520l.	BANK
" 6 " " "	2,520l.	AKTIE-
" 6½ " " "	2,100l.	BOLAG.
" 7 " " "	2,100l.	—
" 7½ " " "	1,680l.	
" 8 " " "	1,680l.	

" If, and to the extent that the sureties do not acquire the claim at the dates specified, the remission, resulting from cl. 2 in conjunction with cl. 1 shall, without prejudice to the provisions of cl. 3, lapse rateably in respect to that amount of debt which remains in relation to Enskilda after setting off any payments which may have been made (Example: Enskilda has received 6,300l. and no further payments have been made; there remains a debt of Schering to Enskilda to the amount of 73,500l.). With regard to the due date and repayment of the remaining amount of debt the provisions of cl. 2, paras. 2 and 3 shall apply. The remaining amount of debt is owing free of interest. Clause 5. All taxes, stamp duties or public dues of any kind whatsoever arising in Germany in connexion with this debt are for the account of Schering. . . . Clause 7. Enskilda can call in the debt with immediate effect by registered letter to Schering, if Schering, the sureties or one of the sureties, becomes bankrupt or applies for opening of proceedings for an arrangement with creditors. Clause 8. This contract of debt is subject in all respects (for example application, construction, validity, dissolution, etc.) to German law. For the legal relationship however between the sureties and the Enskilda under this contract English law applies in every respect Clause 10. This contract of debt comes into operation when the Federal Office for Exchange Control shall have granted the necessary approvals. Clause 11. The contract of debt is drawn in four originals, "one each for Enskilda, Schering and the sureties." By a letter from the Swedish bank to the German company, dated March 17

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1936 (hereinafter called the " March letter ") it was agreed that the last paragraph of cl. 4 of the February contract should be understood as follows : " If and to the extent that the sureties " do not require the claim at the dates stated and Enskilda " is not satisfied by payment by third parties or by execution " on the property of the sureties or in some other way in full, " that is to say including all expenses incurred, if any, then, " without prejudice to the provisions of cl. 3, the remission " resulting from cl. 2 in conjunction with cl. 1 lapses rateably " for that amount of debt which remains towards the Enskilda " after setting off any payments which have been made."

On April 16, 1936, a document in the English language (hereinafter called " the April contract "), addressed to the Swedish bank, was signed by Edwards both as managing director of the English company and as attorney for the Indian company. The clauses, although not numbered in the original, may be conveniently referred to by numbers. Clause 1 was as follows : " In consideration of your making on our joint and several " request an advance of 84,000*l.* sterling (to be made available " in sperrmarks) to Schering-Kahlbaum A. G. of Berlin (hereinafter called ' the German company ') we hereby jointly and " severally guarantee the payment in sterling of the amount " hereinafter mentioned by the German company." The next six clauses contained the usual provisions relating to suretyship. Clause 8 was as follows : " Further we hereby jointly and " severally undertake as principals and not as guarantors to " make the following payments to you in consideration of the " assignment by you to us on the occasion of each such payment " of a like sterling amount of your claim against the German " company. Such payments shall be made as follows namely : " Here followed a list of fourteen six-monthly instalments of decreasing amount expressed in sterling, setting out the dates on or before which each payment should be made and corresponding exactly to the amounts and dates set out in cl. 4 of the February contract. By cl. 9 : " Each such payment as afore- " said shall be a satisfaction pro tanto of our liability in respect " of the guarantee herein contained, and we shall not be liable " to make such payment, in so far as the amount in question " has been paid by the German company or any other person or " company." By cl. 10 : " Default in payment of any one " instalment shall not accelerate the date for payment of any " other instalment, provided that this provision shall not " prejudice your rights of proof in a liquidation of either of the

"undersigned companies." By cl. 12: "This guarantee and agreement is made in accordance with the laws of England." The relationship and obligations established by the February contract were not terminated and continued to subsist. On April 16, 1936, the English company addressed to the Swedish bank a letter (hereinafter called "the April letter") providing for the pledging of certain goods and property to the value of 25,200*l.* to be retained in the hands of a trustee "as security for our liability whether as guarantors or principals" under the April contract, Edwards being named as trustee.

On April 28, 1936, the advance of 84,000*l.* in sperrmarks was made by the Swedish bank to the German company and accordingly "the due date" under cl. 2 of the February contract became April 28, 1944. The first four instalments each amounting to 6,300*l.* fell to be paid under the April contract by the English company or the Indian company on October 28, 1937, April 28, 1938, October 28, 1938 and April 28, 1939, respectively. These were duly paid by the Indian company to the Swedish bank, which in due course assigned to the Indian company equivalent proportions of the German company's debt. The fifth instalment amounting to 3,360*l.* fell due for payment on October 28, 1939, but war broke out between Great Britain and Germany on September 3, 1939. On September 22, 1939, Edwards on behalf of the English company and on his own behalf as trustee under the security agreement contained in the April letter, wrote two letters to the Swedish bank asserting that by reason of the outbreak of war both the security agreement and the April contract were dissolved on the ground that they were for the benefit of an enemy, with the result that the security was released and no further claim could attach thereto. Both the English company and the Indian company refused on October 10, 1939, to pay the fifth instalment and on October 30, 1939, the Swedish bank commenced an action against the English company by a specially endorsed writ in the King's Bench Division claiming payment of the instalment due on October 28, 1939, together with interest thereon at 5 per cent. from that date till judgment. The English company pleaded that such payment would contravene the provisions of the Trading with the Enemy Act, 1939. Hawke J., dismissed the action with costs. The Swedish bank appealed to the Court of Appeal, which dismissed the appeal (*Stockholms Enskilda Bank Aktiebolag v. Schering Ld.* (1)).

(1) [1941] 1 K. B. 424.

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H. L. (E.) An extraordinary resolution for the voluntary liquidation of the English company and the appointment of Henry James Sier as its liquidator was passed on June 23, 1941, and subsequently confirmed at a meeting of its creditors. The whole of its assets and undertaking were sold in the course of the liquidation but 25,000*l.* was placed to the credit of an account in the joint names of Sier, as liquidator, Edwards, as trustee under the terms of the April letter, and Henry Morris, a director of the English company, to answer the obligations (if any) of the English company under the terms of the April letter. On January 29, 1942, the English company commenced an action against the Swedish bank and against Edwards and Morris claiming a declaration that the April contract could no longer be enforced against the English company and an order that Edwards and Morris should release to the English company the sum of 25,000*l.* Alternatively a declaration was claimed that the English company could not at any time thereafter be called on to pay to the Swedish bank any sums which since September 3, 1939, fell due for payment under the April contract while a state of war existed between Great Britain and Germany. In the statement of claim it was pleaded that "the performance of the " April contract has become impossible or has been frustrated " and the April contract can no longer be enforced " against the English company, and that "the April contract is a contract " the continued existence of which would enure for the benefit " of the German company and to the detriment of the [English " company] and/or would involve intercourse between the " [English company] and the German company." On March 10, 1943, Simonds J. held that the continued existence of the April contract would benefit and involve intercourse with the enemy. He did not deal with the question of frustration. By his order (1.) it was declared that the April contract had been abrogated by the outbreak of war between Great Britain and Germany and could no longer be enforced against the English company, and (2.) it was ordered (*inter alia*) that Edwards and Morris should release to the English company the sum of 25,000*l.* and any interest thereon which was standing jointly in their names and in that of the liquidator of the English company. On October 12, 1943, the Court of Appeal discharged the order of Simonds J. and dismissed the English company's action. The English company appealed to the House of Lords.

Macaskie K.C. and *J. A. Wolfe* for the English company, the appellant. A contract between a British company and a

neutral, which still falls to be performed when war breaks out is abrogated at the outbreak of war if its continued existence during the war either would give opportunities for intercourse with the enemy, allowing the conveying of information to him injurious to the conduct of the war, or might tend to increase his resources or cripple those of this country. It would be contrary to public policy for such a contract to remain in existence: *The Hoop* (1); *Esposito v. Bowden* (2); *Janson v. Driefontein Consolidated Mines, Ltd.* (3); *Porter v. Freudenberg* (4); *Robson v. Premier Oil & Pipe Line Co., Ltd.* (5). It is not correct to hold that such a contract as this is only to be treated as suspended and not as abrogated unless the English company can show that the contract while so suspended would in fact tend to increase the enemy's resources or that at least there is a substantial probability that such would be the case. It is enough to show that the existence of the contract would give opportunity for contact with the enemy or would tend to increase his resources and it is not necessary to go further and to show that the opportunity would in fact be taken or that the resources must be increased: see *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (6) and *Soufracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)* (7). In those circumstances such contracts are necessarily abrogated. The basis of their illegality is twofold (1.) either the extreme danger of permitting any kind of intercourse with the enemy or (2.) the necessity for prohibiting any kind of contract that is injurious to the country's interests in time of war (see McNair on Legal Effects of War (2nd ed.), p. 89). When the mischief to be guarded against is the same in the case of all contracts, the remedy is the same: dissolution and not suspension. There is no authority for the proposition that in the case of a contract with a neutral, when the question of guarding against this mischief arises, a different and more indulgent treatment should be accorded than in the case of a contract with the enemy, so that suspension rather than abrogation should be decreed. The only distinction between a contract with an enemy and one with a neutral is that in the case of a contract with an enemy, the existence of which gives opportunity for intercourse,

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(1) (1799) 1 C. Rob. 196, 202.

(2) (1857) 7 E. & B. 763.

(3) [1902] A. C. 484, 499.

(4) [1915] 1 K. B. 857.

(5) [1915] 2 Ch. 124.

(6) [1918] A. C. 260, 267, 269, 276, 285.

(7) [1943] A. C. 203, 211, 212, 213, 231, 251, 252, 253.

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it is assumed that it will benefit the enemy, while, in the case of a contract with a neutral, it must be shown that performance would create a likelihood of intercourse between a British subject and an enemy or of benefit to the enemy. The time for deciding whether or not a contract is abrogated is the outbreak of war and not later: see McNair on Legal Effects of War, 2nd ed., p. 87. The test is whether the performance of the contract in time of war might involve illegality. The contract in this case should be treated as abrogated and the security for its performance should be released. This contract is still executory. It is true that a debt payable by instalments would come within the words "a liquidated sum of money, which will be "treated as a debt" (McNair, Legal Effects of War, 2nd ed., p. 93) and this may be so in spite of provision for discount on anticipation of the instalment dates. But the circumstances of the present case go beyond this. The contract is still executory because of the provision for the assignment by the Swedish bank to the English company of its rights against the German company. The contract was primarily one to purchase instalments of a debt. In the case of an obligation to pay to an enemy in the future a liquidated sum of money his rights are merely suspended during the war. (McNair, Legal Effects of War, 2nd ed., p. 119.) But the obligations of the English company in this case do not fall within that category. The possibility of benefit to the enemy, if the April contract were merely suspended during the war, is not too vague and uncertain to justify the court in treating the contract as abrogated. Admittedly there is nothing illegal in an English principal debtor paying his creditor, even though the debt were guaranteed by an enemy, who would thus be relieved of a contingent liability. The law only regards his primary liability as a debtor. In this case the primary liability is on the German company. The whole object of this contract and the arrangements made, which were the same under the February and the April contracts was to benefit the German company. The sperrmarks could only be spent in Germany. The Swedish bank was willing to sell them at a cheap rate in exchange for sterling. The German company, which wished to buy them, arranged for its subsidiaries in England and India to pay in sterling and they were to be repaid in goods by the German company. The English company got no advantage out of the transaction at all. The contract, if remaining in existence, would confer a benefit on the German company in the first place because the English

company would be liable to pay the Swedish bank the moneys falling due thereunder and there would thereby be substituted for the German company's obligations to a neutral, obligations to an English company which could not enforce them during the continuance of the war. On the other hand the Custodian of Enemy Property could collect debts falling due during the war. This case is distinguishable on its facts from *R. & A. Kohnstamm, Ltd. v. Ludwig Krumm (London), Ltd.* (1). In the next place, the existence of the security under the April letter rendered it improbable that the Swedish bank would enforce its rights against the German company during the war and also unnecessary that it should do so. Finally, the benefit of the discount, provided for by the February contract as amended by the March letter, would be preserved for the benefit of the German company, thereby reducing its aggregate future indebtedness. The proviso to cl. 4, as amended by the March letter, should be read as follows: "If and to the extent that the "sureties do not acquire the claim at the dates stated and "Enskilda is not satisfied by payment by third parties or by "execution on the property of the sureties or in some other "way, in full, that is to say including all expenses incurred, if "any, then, without prejudice to the provisions of cl. 3, the "remission resulting from cl. 2 in conjunction with cl. 1 "lapses for that amount of debt which remains towards the "Enskilda after setting off any payments which may have "been made." On the spermars being placed at the disposal of the German company it became debtor to the Swedish bank in the sum of 84,000*l.* If the English company paid the instalments undertaken in time, this would ensure a remission, whether the German company paid or not. The remission thus preserved for the benefit of the German company would be one of 40 per cent., so that for every 6*d.* paid it would benefit to the extent of 10*d.* Moreover, if the contract had remained in existence after the outbreak of war it would have involved, or given opportunities for, intercourse with the enemy, since the English company would have required to ascertain from the German company what, if any, payments had been made. [They referred to *In re Badische Co., Ltd.* (2) and *Veithardt & Hall, Ltd. v. Rylands Brothers, Ltd.* (3).] Alternatively, if the April contract was not abrogated by the outbreak of the war, it was frustrated by the fact that during the war, i.e., for a

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(1) [1940] 2 K. B. 359.

(3) (1917) 86 L. J. (Ch.) 604.

(2) [1921] 2 Ch. 331, 373; 374.

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period of indefinite and unpredictable duration, its performance was rendered impossible and illegal. Accordingly, the parties were excused from further performance and the contract should be regarded as at an end, since it essentially called for payments of instalments spread over a period of eight years. [They referred to *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.* (1) and McNair on Legal Effects of War, 2nd ed., p. 153.]

Scott Cairns and *Lindner* for the Swedish bank, the respondent. This case is not covered by any previous decision of the House of Lords and little guidance is to be found in the authorities. The propositions put forward by the appellant company are wider than the decided cases justify and are an extension of them. The rule with regard to the abrogation of certain contracts on the outbreak of war applies only to executory contracts and the contract here in question is not an executory contract for that purpose. The arrangement was carried into effect by those agreements and it is necessary to consider the terms of the February contract with the rest. Under the April contract the relationship between the Swedish bank and the English and Indian companies was the same as under the February contract, which was never terminated. On a full examination of the transaction it appears that the Swedish bank had before the outbreak of war already done everything necessary to acquire its rights. The contract is primarily one for the payment of a debt. Nothing remains to be done by the English company except pay the money. Those payments are to be made at the request of the German company and, quite independently of the provisions of cl. 8 of the April contract and whether it is paid as principal or surety, the English company would be entitled to reimbursement, since equity would transfer to it the right vested in the Swedish bank to recover the amounts paid from the German company. The provision in the April contract for the assignment of the rights of the Swedish bank against the German company is just a provision as to the method of payment. The Swedish bank having wholly performed the April contract before the outbreak of war, it had an accrued cause of action in debt for each instalment, so that the tender by it of an executed assignment was a mere formality. It could sue for an instalment unpaid on the specified date on an allegation that it was always ready and willing to execute an assignment on payment. Apart from any question whether

(1) [1942] A. C. 154.

in relation to both parts of the April contract there has been such performance by the Swedish bank as makes the contract executed, it has wholly performed that part which deals with suretyship, having complied with the request of the English and German companies, making over the marks to the latter. This constituted consideration for the suretyship. There is no authority for the proposition that in a case where two quite separate obligations arise from the same document, one of which has accrued and the other of which has not, then if one part is dissolved the other must be also. If there is an accrued right under the contract, the dissolution of that contract in relation to other matters will leave the accrued right untouched. Further, even in the case of some executory contracts, particularly those which are concomitants of rights of property, the outbreak of war does not have the effect of abrogation: *Ertel Bieber & Co. v. Rio Tinto, Ltd.* (1). Moreover the different classes of contract there mentioned by Lord Dunedin are not stated to be the only exceptions to the general rule as to abrogation. Thus a policy of insurance taken out by an alien enemy would not be abrogated by the outbreak of war. See also *Seligman v. Eagle Insurance Co.* (2); *Robson v. Premier Oil & Pipe Line Co., Ltd.* (3) and *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Carton-Nagen-Industrie* (4). The law sets its face against confiscation. The rule as to the abrogation of contracts which benefit the enemy is founded on public policy and the law recognizes that it is against public policy that a person's property should be taken away or that he should be deprived of rights arising from his having executed a contract. In this case the April contract is a concomitant of the right of property which the Swedish bank acquired by its contract with the German company. If this contract were held to be abrogated the result would be to confiscate the property, not of an enemy, but of a neutral. Moreover, the security created by the April letter itself constitutes a right of property within the principle. The fact of the performance of a contract having become illegal does not necessarily involve abrogation. Possibly the contract may be only suspended till the end of hostilities. Temporary illegality need not involve the termination of the contract: see *Hadley v. Clarke* (5); *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (6); *Andrew Millar & Co., Ltd. v. Taylor*

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(1) [1918] A.C. 269, 270, 282, 283.

(2) [1917] 1 Ch. 519.

(3) [1915] 2 Ch. 124.

(4) [1918] A. C. 239.

(5) [1799] 8 Term Rep. 259.

(6) [1918] A. C. 260, 269.

H. L. (E.) *& Co., Ltd. (1)*; *Metropolitan Water Board v. Dick, Kerr & Co., Ltd. (2)* and *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd. (3)*. No authority has gone so far as to lay down that, if it is possible to penalize the enemy by abrogating a contract, it must necessarily be abrogated and not suspended. When none of the parties to the contract is an enemy, suspension of the contract is to be preferred, as the rule relating to abrogation does not apply so strictly in the case of a neutral. Accordingly, the April contract should be treated as suspended. If, however, the whole arrangement be looked at and the contract be regarded as being between more than two parties, only one of them being in England, the contract still ought not to be abrogated. There has been no case of a contract between three parties being abrogated as regards one party only, but left alive in relation to the other two. Further, in the absence of evidence to the contrary the law of Germany would be assumed to be the same as that of England, so that, if the contract fell to be abrogated in this country, on the ground that performance would benefit the Germans, it would also be held to be abrogated in Germany, as between the German company and the Swedish bank, on the ground that performance would benefit the English company, because the Swedish bank had the English company to look to for the discharge of the debt. This would merely have the result of penalizing a neutral. Moreover, the English company was German controlled and abrogation of the contract, while benefiting that company by making its shares more valuable would also benefit the German shareholders. See *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd. (4)*. In this case the continued existence of the April contract did not involve any intercourse with the enemy during the war, in the carrying out of the surety agreement. Moreover, it involved no real benefit to the enemy. The carrying out of the contract earned no remission for the German company, since it appears from cl. 2 of the February contract that it was indebted to the Swedish company only in the sum of 50,400*l.*, the amount guaranteed. The use of the word "remission" in cl. 4 is not conclusive to defeat the construction. The mere possibility of benefit accruing to the enemy, assuming that there is such a possibility, from the continued existence of the April contract, was not sufficient to

(1) [1916] 1 K. B. 402.

(2) [1918] A. C. 119, 126.

(3) [1916] 2 A. C. 307, 347.

(4) *Ibid.* 307, 337.

bring about its abrogation on the outbreak of war on the ground of public policy. [They referred to *In re Badische Co., Ltd.* (1); *Esposito v. Bowden* (2); *Distington Hematite Iron Co., Ltd. v. Possehl* (3); *Zinc Corporation, Ltd. v. Hirsch* (4); *Halsey v. Lowenfeld* (5).]

Macaskie K.C. in reply. This case does not fall within the class of those in which the right to recover a liquidated sum of money has accrued before the outbreak of war : see *Seligman v. Eagle Insurance Co.* (6); *Robson v. Premier Oil & Pipe Line Co., Ltd.* (7); *In re Anglo International Bank, Ltd.* (8); *Halsey v. Lowenfeld* (9), and *McNair, Legal Effects of War*, 2nd ed., pp. 100, 120. No authority has laid it down that in the case of a contract beneficial to the enemy abrogation can be avoided : see *Stockholms Enskilda Bank Aktiebolag v. Schering, Ltd.* (10). Once the reality of the transaction and the true interpretation of the contract leads to the conclusion that the German company would benefit by its continued existence and performance, there is no authority for dealing with the situation otherwise than by abrogation. This is not a case where there can be severance of the contract : see *Attwood v. Lamont* (11); *Denny, Mott & Dickson, Ltd. v. James B. Fraser & Co., Ltd.* (12) and *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.* (13).

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THE HOUSE took time for consideration.

Nov. 29. LORD THANKERTON (read by LORD GODDARD). My Lords, this is an appeal from an order of the Court of Appeal, dated October 12, 1943, which discharged an order of Simonds J. dated March 10, 1943, and dismissed the appellants' action. By the order of Simonds J. (1.) it was declared that a contract dated April 16, 1936, which I will call the April contract, and made between the appellants acting on behalf of themselves and on behalf of Schering-Kahlbaum (India), Ltd., which I will call the Indian company, and the respondent bank, had been abrogated by the outbreak of war between Great Britain and

(1) [1921] 2 Ch. 331, 371.

(2) 7 E. & B. 763, 792.

(3) [1916] 1 K. B. 811.

(4) [1916] 1 K. B. 541.

(5) [1916] 2 K. B. 707.

(6) [1917] 1 Ch. 519, 525.

(7) [1915] 2 Ch. 224, 131.

(8) [1943] Ch. 233.

(9) [1916] 2 K. B. 707, 716.

(10) [1941] 1 K. B. 424.

(11) [1920] 3 K. B. 571.

(12) [1944] A. C. 265, 273.

(13) [1915] A. C. 79, 86.

H. L. (E.) Germany and could no longer be enforced against the appellants and (2.) it was ordered *inter alia* that the respondents Arthur William Edwards and Henry Morris should release to the Appellants 25,000*l.* and any interest thereon which was standing in joint names of the liquidator of the appellant company and these two respondents under the terms of a letter, dated April 16, 1936, to provide security to the respondent bank for the appellants' performance of their obligations under the April contract. In this appeal the appellants seek restoration of the order of Simonds J. Alternatively they maintain that the April contract, by reason of circumstances arising out of the war, became impossible of further performance, and that the parties were thereby excused from further performance.

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Early in the year 1936 the respondent bank was possessed of a sum of German reichsmarks, the value of which at the current rate of exchange was 84,000*l.*, which Schering-Kahlbaum Aktiengesellschaft, which I will call the German company, desired to acquire. The German company was the parent company of the appellant company, and owned or controlled all its share capital; it was also the parent company of the Indian company. The German company found it convenient, owing to restrictions in Germany, to provide for the sterling payments to be made to the respondent bank through its two subsidiaries, with whom it could settle its indebtedness by means of the manufactured goods which it supplied to them. The contractual relations between the parties were contained in three agreements, namely (1.) A contract in writing dated February 24 and 28, 1936, which I will call the February contract, which was made between the respondent bank of the one part, the German company of the other part, and the appellants and the Indian company as sureties. (2.) The April contract, made between the appellants, the Indian company and the respondent bank. (3.) A letter dated April 16, 1936, by the appellants to the respondent bank, which I will call the April letter. The February contract was in German, and subject to German law, but for the legal relationship between the sureties and the respondent bank the English law was to apply. In the absence of evidence to the contrary, it may be assumed that, for present purposes, the German law does not differ from the English law. Though there was some argument to the effect that the price payable by the German company for the reichsmarks was 50,400*l.*, I am satisfied, looking at the various

provisions, that, on the reichsmarks being placed at the disposal of the German company, the latter became debtors to the respondent bank in the sum of 84,000*l.*, payable without interest in effective pounds sterling on the expiry of eight years thereafter. The reichsmarks were placed at the disposal of the German company on April 28, 1936. For the debt, the sureties became surety jointly and severally as principals to the amount of 50,400*l.*, with the proviso that, against the liability as sureties all payments must be set off which the respondent bank should receive from the sureties or one of them or from the principal debtor or from third persons for account of the sureties or of the principal debtor. Clause 4 begins by providing that the sureties would acquire from the respondent bank its claims against the German company by a series of fourteen six-monthly instalments, gradually decreasing in amount, beginning one and a half years after April 28, 1936, with an instalment of 6,300*l.*, and ending eight years after the said date with a final instalment of 1,680*l.* The instalments make up a total of 50,400*l.* Clause 4 then proceeds: "If, and to the extent that the sureties do not acquire the claim at the dates specified, the remission resulting from cl. 2 in conjunction with cl. 1 shall, without prejudice to the provisions of cl. 3, lapse rateably in respect to that amount of debt which remains in relation to Enskilda after setting off any payments which may have been made (Example: Enskilda has received 6,300*l.* and no further payments have been made; there remains a debt of Schering to Enskilda to the amount of 73,500*l.*). With regard to the due date and repayment of the remaining amount of debt the provisions of cl. 2, paras. 2 and 3 shall apply. The remaining amount of debt is owing free of interest." It may be noted that this paragraph does not affect the amount of the liability of the sureties, that the remission referred to is clearly the reduction of the debt from 84,000*l.* to 50,400*l.*, and that the effect of this paragraph was somewhat obscurely modified by a letter dated March 17, 1936, from the respondent bank to the German company, but the effect of it would seem to be that the benefit of the remission was preserved to the latter, provided that the payment of the instalments, or some of them, though made after their due dates, was made prior to the expiry of the eight years. I will only add that the February contract is headed "Contract of Debt" and is so described at least four times in the body of the agreement. By the April contract, which was in English, the liability of the appellants and the

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H. L. (E.) Indian company as sureties is not materially altered, but under cl. 8 they jointly and severally undertook as " principals and
 1945 " not as guarantors to make the following payments to you in
 SCHERING " consideration of the assignment by you to us on the occasion
 LD. " of each such payment of a like sterling amount of your claim
 v. " against the German company. Such payments shall be
 STOCKHOLMS " made as follows namely :— " Here followed a list of fourteen
 ENSKILDA six-monthly instalments of decreasing amount, corresponding to
 BANK those in cl. 4 of the February contract. Clause 9 provided that
 AKTIE- " each payment under cl. 8 should be a satisfaction pro tanto of
 BOLAG. their liability as sureties, and that they should not be liable to
 Lord make such payment, in so far as the amount in question had
 Thankerton. been paid by the German company or any other person or
 company. Clause 10 provided that default in payment of any
 one instalment should not accelerate the date for payment of
 any other instalment, provided that that provision should not
 prejudice the respondent bank's rights of proof in a liquidation
 of either the appellants or the Indian company. On the same
 day, the appellants addressed the April letter to the respondent
 bank, providing for the pledging by them of goods to the value
 of 25,000*l.* as security for the discharge by the appellants of
 their obligations to the respondent bank, whether as sureties
 or principals, under the April contract. The assets of the
 appellants have been realized in the liquidation, and the sum
 of 25,000*l.* has now been placed as security in joint names as
 already mentioned. Stripped of its somewhat intricate
 provisions, it appears that, in substance, the contract was for
 the sale of commodities, namely, German reichsmarks, for a
 price, which was to be paid in sterling. The commodities had
 been supplied and accepted, and all that remained was the
 payment of the price, and the only provisions remaining opera-
 tive related to the payment of the debt due in respect of the
 price, and the relative safeguards for its payment. Four
 instalments had been duly paid by the appellants to the
 respondent bank prior to the outbreak of war on September 3,
 1939. The fifth instalment, amounting to 3,360*l.*, became due
 on October 28, 1939 ; the appellants took the view that such
 payment would contravene the provisions of the Trading with
 the Enemy Act, 1939, and the respondent bank raised an action
 for recovery of the amount in the King's Bench Division. The
 action was dismissed, and its dismissal was confirmed by the
 Court of Appeal. The appellants have now raised the present
 action, to have it declared that the April contract is no longer

enforceable against them, and for the release to them of the 25,000*l.* H. L. (E.)

My Lords, we had a very full citation of authorities and the able arguments of counsel on both sides have been very helpful, but I find little need to go beyond the speeches of Lord Dunedin and Lord Sumner in the well-known case of *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (1), in which the earlier authorities are reviewed. Lord Dunedin says (2): "From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1.) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2.) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law." In his judgment Lord Greene M.R. appears to draw a distinction, on matter of principle, between contracts between a British subject and an alien enemy, and a contract between a British subject and a neutral. In my opinion, the paramount consideration of public policy in either case is the unhampered carrying on of the war, without harmful intercourse with the enemy, or economic benefit to the enemy or economic disadvantage to this country. But the applicability of the principle is likely to be rare in the case of contracts between a British subject and a neutral, or not so obvious as in the case of a contract between a British subject and an enemy. As regards the consequence of this contravention of public policy, I am of opinion that the courts have no choice between the abrogation and suspension of the contract, abrogation being the necessary consequence. I agree with Lord Sumner's statement on this point in *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (3): "My Lords, if upon public grounds on the outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves? The prohibition, which arises at common law on the outbreak of war, has for this purpose the effect of a statute. The choice between suspending and discharging the contract on the outbreak of war was quite deliberately made, and if occasionally the con-

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(1) [1918] A. C. 260.

(2) Ibid. 274.

(3) Ibid. 286.

H. L. (E.) " tract is said to be only suspended, or a court refuses to dispose
 1945 " of a case on the ground of dissolution alone, this only brings
 SCHERING " into relief the fact that by an overwhelming preponderance of
 LD. " authority such trading contracts have been held to be dis-
 v. " solved on the outbreak of war. An appearance of authority
 STOCKHOLMS " to the contrary is sometimes found to be in truth a misreading
 ENSKILDA " of the language of a decision." After reference (1), by way of
 BANK " illustration, to the language of the Earl of Halsbury L.C., in
 AKTIE- *Janson v. Driefontein Consolidated Mines, Ltd.* (2), Lord Sumner
 BOLAG. " proceeded : " There can be no doubt that the matter must have
 Lord " been considered. To many people suspension seems to have
 Thankerton. " much to recommend it. Freedom of contract is challenged
 " less ; the sacrosanctity of commerce is respected more.
 " The courts could not have adopted the rule of dissolution
 " unless they had reasoned that suspension would be
 " inconsistent with this principle of the law of contract. I will
 " quote the language of Willes J. in *Esposito's* case (3). ' In all
 " ' ordinary cases, the more convenient course for both parties
 " ' seems to be that both should be at once absolved, so that
 " ' each, on becoming aware of the fact of a war, the end of
 " ' which cannot be foreseen, making the voyage or the ship-
 " ' ment presumably illegal for an indefinite period, may
 " ' at once be at liberty to engage in another adventure without
 " ' waiting for the bare possibility of the war coming to an end
 " ' in sufficient time to allow of the contract being fulfilled, or
 " ' some other opportunity of lawfully performing the contract
 " ' perchance arising. The law upon this subject was doubtless
 " ' made, according to the well-known rule, to meet cases of
 " ' ordinary occurrence.' To his mind I think it is clear that the
 " rule was one made to provide certainty at the outbreak of war,
 " where in itself everything is uncertain ; that it was one made
 " to apply generally, although taking its form from the needs of
 " ordinary cases ; and that, for the purpose of applying it, the
 " case must be looked at as things stood when war broke out,
 " and not as they were ascertained to be or as they ultimately
 " happened during the interval before the trial of the action."

The contracts which fall under this principle of public policy are clearly contracts the performance or further performance of which after the outbreak of war may involve the consequences which the principle, by its application, seeks to avoid, but it is equally clear that there are certain well established exceptions

(1) [1918] A. C. 260, 287.

(3) 7 E. & B. 763, 792.

(2) [1902] A. C. 484, 493.

to the contracts thus broadly defined. I may quote the speech of Lord Dunedin in the case of *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (1): "Now *Esposito v. Bowden* (2) has been cited by "learned judges in many cases, and no doubt has ever been cast "on its authority. Nor has it ever been taken as dealing with "any particular contract, but it has been held as dealing with "contracts in general. So far as *Janson's* case (3) is concerned, "the only matter there decided was that there must be an "actual state of war to determine a contract: a mere "imminence of war is not enough. It is true that Lord "Halsbury's dictum, if applied as an universal proposition, "would be counter to the doctrine of *Esposito v. Bowden* (2). "But I am satisfied not only that the dictum was obiter and not "binding, but that Lord Halsbury was not dealing with or "thinking of executory contracts, but of contracts under which "rights had already accrued. There is indeed no such general "proposition as that a state of war avoids all contracts between "subjects and enemies. Accrued rights are not affected "though the right of suing in respect thereof is suspended. "Further, there are certain contracts, particularly those which "are really the concomitants of rights of property, which even "so far as executory are not abrogated. Such as, for instance, "the contract between landlord and tenant, of which an "example may be found in the recent case of *Halsey v. Lowenfeld* (4). In other words, the executory contract which is "abrogated must either involve intercourse, or its continued "existence must be in some other way against public policy as "that has been laid down in decided cases." In the case of the established exceptions to which Lord Dunedin refers the necessity for intercourse with an enemy is obviated by the postponement of the right of action, and non-forfeiture of an existing right supersedes any question of an immediate or future benefit of the enemy. This is well illustrated in the order made in the *Ertel Bieber* case (5), to which I will refer later. In the present case Simonds J., applied that test at once without considering whether the case fell within the class of exceptional cases, and, coming to the conclusion that continued performance of the contract would involve both such intercourse and such benefit, he held that the contract was abrogated on the outbreak of war. The question of whether the present case fell within the class of exceptional cases was also not considered

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(1) [1918] A. C. 260, 269.

(2) 7 E. & B. 763.

(3) [1940] A. C. 484, 493.

(4) [1916] 2 K. B. 707.

(5) [1918] A. C. 260.

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by the Court of Appeal, but, in considering the test of intercourse and benefit, they drew a distinction between the case of a contract between a British subject and an enemy subject and the case of a contract between a British subject and a neutral subject, and this appears to have led them to differ from Simonds J., and they reversed his decision. As already expressed by me, I am not prepared to accept that, as a matter of principle, there is any distinction between these two classes of contract, but it is unnecessary for me to deal further with the judgments of the courts below, as I have come to the conclusion that the present case does fall within the exceptional class, and that, for that reason, the April contract was not abrogated by the outbreak of war, so that the appeal fails so far as rested on that ground. I am inclined to agree with Sir Arnold McNair's suggestion (*Legal Effects of War*, 2nd ed., at p. 93), "that the distinction between 'executed' and 'executory contracts' may not be very helpful in this connexion and that it may be found safer to say that . . . the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war." In this view, I proceed to consider what is included in the phrase, "a liquidated sum of money, which will be treated as a debt." The appellants' counsel admitted that a debt payable by instalments would be so included, and that provision for discount on anticipation of the instalment dates would not alter the position, nor would express provision for the acknowledgment in writing of each sum paid affect the matter. In my opinion the fact that the creditor held security for the payment of the debt, which would fall to be restored to the debtor on payment of the debt, would make no difference even though the security had been absolutely assigned to the creditor, and would require retransfer to the debtor. In my opinion, the present case only raises one further point, namely, the fact that the appellants were bound as principals to the respondent bank, to discharge the debt in respect of which the German company were the original principal debtors, and were therefore entitled under the April contract on payment to the respondent bank of each instalment, to an assignment by the latter of a like sterling amount of their claim against the German company. My Lords, I cannot think that this makes any difference to the position. The appellants,

under the April contract, were bound to discharge the whole debt within a period which would terminate before the lapse of the eight years, when the liability of the German company to make any payment towards the debt would first arise ; in other words, the appellants were bound to acquire the debt, and their being placed by assignment in the shoes of the respondent bank is merely incidental to the discharge of the debt owed to the respondent bank and is not different in substance from the case of the return of securities to which I have already referred. It is important to make clear that the principle of abrogation does not involve destruction of the contract so far as already performed. That which is abrogated is the further performance of the contract, as from the outbreak of war ; or, as Lord Dunedin expresses it in the passage already quoted, the continued existence of the contractual relationship is prohibited. As Lord Finlay L.C. states in *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft Für Carton-Nagen-Industrie* (1) : " It is not " the law of this country that the property of enemy subjects is " confiscated." This important point is well illustrated by the form of order that was made in the *Ertel Bieber* case (2), which related to contracts for the sale of large quantities of cupreous sulphur ore, to be delivered by instalments extending over a number of years. The order made by Sankey J., which was affirmed in the Court of Appeal and by this House, was in similar terms to that made in the case of *Zinc Corporation, Ltd. v. Hirsch* (3), which related to contracts of sale of zinc concentrates to be delivered by monthly instalments. In both cases the contracts had been partly performed before the outbreak of war. In the *Zinc Corporation's* case (4) Bray J. made a declaration, which was affirmed by the Court of Appeal, that the contract was dissolved as from the outbreak of war, " by the existence of a state of war between Great Britain and " Germany, and that the plaintiffs as from the said time were " and are released and absolved from any obligation at any time " to supply to the defendants or their assigns any zinc con- " centrates," but " the declaration was without prejudice to " the rights of either party in respect of concentrtes supplied " or which ought to have been supplied prior to the said time or " to moneys paid to the special trust account mentioned in the " agreement of December 14, 1908, or to any cause of action " which had arisen prior to August 4, 1914." It seems clear

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(1) [1918] A. C. 239, 244.

(3) [1916] 1 K. B. 541.

(2) [1918] A. C. 260.

(4) Ibid. 551.

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to me that this reservation included matters involving intercourse with the enemy, but, as Lord Dunedin points out, the right of action is postponed. It seems equally clear it might involve substantial economic benefit to the enemy. The declaration of Simonds J. contains no such reservation, and the result, in my opinion, is to confiscate the right of debt, which had arisen to the respondent bank on the delivery of the reichsmarks on April 28, 1936. I am not aware of any precedent for such confiscation, and it is clearly not justified under the decision of this House in the *Ertel Bieber* case (1). Indeed it is inconsistent with it. I may add that in the earlier case of *Esposito v. Bowden* (2), the performance of the contract had not commenced prior to the outbreak of war.

As regards the appellants' alternative argument that the April contract, by reason of circumstances arising out of the war, became impossible of further performance, and that the parties were thereby excused from further performance, that argument is clearly out of place in the view that I have already expressed that all that remained to be done was the discharge of an accrued debt by instalments, subject to an assignment of the right of ultimate recourse against the German company and I have nothing to add to the views expressed by the learned Master of the Rolls on this matter. It follows that, in my opinion, the appeal fails, and I move that it should be dismissed with costs.

LORD RUSSELL OF KILLOWEN (read by LORD WRIGHT). My Lords, this is a very exceptional case arising out of a very exceptional contract made between a German company (called Schering-Kahlbaum A. G. Berlin, and hereinafter called the German company), a Swedish bank (called Stockholms Enskilda Bank Aktiebolag and herein called Enskilda), and two companies called respectively Schering, Ld. (a company registered in England) and Schering-Kahlbaum India, Ld. (a company registered in India). As may be gathered from their names the English company and the Indian company were subsidiaries of the German company, and dealt, in their respective spheres, in drugs and chemicals manufactured by the German company. The German company owned all the shares in the English company, which was therefore completely under its control. In the year 1936, Enskilda and others owned a large quantity of sperrmarks in Germany which the

(1) [1918] A. C. 260.

(2) 7 E. & B. 763.

German company was anxious to acquire. Sperrmarks were reichsmarks spendable only in Germany. Throughout the transaction with which we are concerned Enskilda was in fact acting for this group of owners, who were willing to sell for sterling, which the German company could only furnish through its two subsidiaries. Thus it was that the English company and the Indian company became involved in the transaction between Enskilda and the German company. The rights and obligations of the four contracting parties were first defined and recorded in a document (referred to as the February contract) in the German language and dated February 24 and 28, 1936, a translation of which has been agreed between the parties. It is headed "Contract of Debt," but it is really a contract for the sale of reichsmarks. By cl. 1 Enskilda agrees to sell "an amount in reichsmarks to the amount of the "equivalent of 84,000*l.* sterling." Clause 2 provides that in respect of the reichsmarks the German company shall be indebted to Enskilda in 50,400*l.* free of interest; and then follow these words "The debt shall fall due on the expiry of "eight years reckoned from the day of paying out." It is agreed that the due date became April 28, 1944. By cl. 3 the English company and the Indian company constituted themselves surety for the debt "jointly and severally as principals "to the amount of 50,400*l.*" Then followed cl. 4, which requires to be set out verbatim. [His Lordship read the clause and continued:] The other clauses need not be referred to: but it will be convenient at this stage to state my view of the true construction of this agreement, which became operative on April 28, 1936. The primary debt for which the German company became liable to Enskilda was the sum of 84,000*l.* referred to in cl. 1. I am of opinion that this must be so, notwithstanding the meaning to the contrary which would *prima facie* be gathered from cl. 2, because any other view is not consistent with the words "to the amount of "50,400*l.*" in cl. 3 and is hopelessly inconsistent with the second half of cl. 4. The German company made itself liable to pay 84,000*l.* to Enskilda at the end of eight years, but the liability might be reduced by degrees throughout the eight years according as the sureties made some or all of the payments specified in cl. 4 and might ultimately amount to no more than a debt of 50,400*l.* owing, not to Enskilda, but to the sureties. The sureties, it is to be observed, whose liability as sureties is limited to 50,400*l.* and cannot mature for eight years,

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assume under cl. 4 a most unusual burden, viz., the obligation to pay off portions of their principal's debt before any part of it is due from the principal, and so reduce their principal's liability by an amount for which the sureties can never be liable; but this unusual feature is easily accounted for when one remembers that these sureties were bound to do whatever the principal debtor told them to do.

Notwithstanding the existence of the February contract, a further document was executed, in the English language, by Enskilda, the English company and the Indian company, which is known as the April contract. Why this document was executed has never been explained. Both sides agree that the relationship and obligations as between Enskilda and the two companies are the same as the relationship and obligations which were established as between them by the February contract, and that the latter have never been terminated and still subsist. It may be that the parties desired a record in the English language of their obligations inter se, or it may be that they wished to make it clear that cl. 4 of the February contract was obligatory and not merely optional on the part of the two companies. But whatever the object in view, the April contract is the contract in relation to which this action is brought. Nevertheless, in my opinion, it is quite impossible to treat that contract as a matter apart and separate from the February contract: it is part and parcel of one transaction between Enskilda and the German company, into which the two companies are introduced by the German company in order to provide sterling and thus enable the German company to achieve its object, namely, the purchase of the sperrmarks. The April contract takes the form of a document addressed to Enskilda, dated April 16, 1936, and signed by a Mr. Edwards both as managing director of the English company and as attorney of the Indian company. It opens thus: "In consideration of your making on our joint and several request an advance of 84,000*l.* sterling (to be made available in sperrmarks) to [the German company] we hereby jointly and severally guarantee the payment in sterling of the amount hereinafter mentioned by the German company." The amount thereinafter mentioned is 50,400*l.* This opening statement may be characterized as a gentle fiction. It is clear from the February contract, and a letter of November 5, 1935, from London to Bombay, that the initiative and the request came from the German company and that the suretyship was

undertaken under the German company's instructions. The April contract contains usual provisions relating to the suretyship. In addition it contains three clauses which, although not numbered in the original, were conveniently referred to during the arguments as cls. 8, 9 and 10. Clause 8 ran thus: "Further we hereby jointly and severally undertake as principals and not as guarantors to make the following payments to you in consideration of the assignment by you to us on the occasion of each such payment of a like sterling amount of your claim against the German company. Such payments shall be made as follows, namely:" then follows a list of amounts in sterling, and the dates on or before which each payment shall be made, corresponding exactly with the amounts and dates set out in cl. 4 of the February contract. The subsequent part of cl. 4 naturally does not appear in the April contract, as it deals with a matter which concerns only Enskilda and the German company. Clause 9 of the April contract in effect corresponds with cl. 3 of the February contract. Clause 10 provides that default in payment of one instalment shall not accelerate the date for payment of any other instalment. There was no suggestion in the February contract that it would. On the same date (April 16, 1936), the English company gave security for its liability under the April contract "whether as guarantors or as principals." The nature and terms of the security are set out in what has been called the April letter, but in the view which I take of this case it is unnecessary to refer to that document in detail. One other document should be mentioned. Some doubt seems to have arisen as between Enskilda and the German company as to the true construction to be placed upon that part of cl. 4 of the February contract which (as I have stated) was omitted from cl. 8 of the April contract, and the construction which was agreed between them is set out in a letter from Stockholm to Berlin of March 17, 1936. But again, in the view which I take of this case, it is unnecessary to set out the contents of this letter, or to discuss its exact effect upon the provision as originally drafted.

All went smoothly under the February and April contracts. The German company acquired the reichsmarks, the first four payments by the two companies mentioned in cl. 4 of the February contract and cl. 8 of the April contract were made, and the corresponding claims of Enskilda against the German company were assigned, with the result that the liability of the German company to Enskilda which would become due at the

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end of the eight years became reduced to 42,000*l.* instead of 58,800*l.* The fourth payment and assignment took place on April 28, 1939. The fifth payment and assignment fell to be made on October 28, 1939, but in the meantime, on September 3, 1939, war broke out between this country and Germany. The crucial question on this appeal can now be stated, viz., was the April contract abrogated on the outbreak of war, so that it can no longer be enforced at any time thereafter? As a matter of history it is right to state that on October 30, 1939, Enskilda commenced an action in the King's Bench Division claiming payment of the fifth payment, viz., 3,360*l.*, but the action was dismissed by Hawke J., whose decision was affirmed by the Court of Appeal. The ground of the decision was that the payment would be for the benefit of the German company, and was therefore prohibited by the Trading with the Enemy Act, 1939. Subsequently the English company went into voluntary liquidation, and its assets have been sold, but a sum of 25,000*l.* has been placed in joint names to answer its obligations (if still subsisting) under the April letter. On January 29, 1942, the English company issued the writ in the present action, claiming a declaration that the April contract can no longer be enforced against it and an order for the release to it of the 25,000*l.* above-mentioned. This claim was based upon allegations that the April contract was a contract the continued existence of which would be for the benefit of the enemy, or would involve intercourse between the English company and the enemy. It was also alleged that the contract had been frustrated. Simonds J. was of opinion that the April contract was one the performance or continued existence of which after September 3, 1939, would benefit the enemy, and would involve intercourse with the enemy. He did not deal with frustration. He accordingly made an order declaring that the April contract had been abrogated by the outbreak of war and could no longer be enforced against the plaintiffs, and ordering the release of the 25,000*l.*

On appeal this order was discharged and the action was dismissed. As I read the judgment of the Court of Appeal the reasoning proceeded thus. It was admitted that further performance of the April contract during the war "must benefit the enemy" (1); it was also apparently agreed that a contract with a neutral the further performance of which during the war would "in fact confer an immediate or future benefit

(1) [1944] Ch. 13, 33.

“on the enemy” would be abrogated by the outbreak of war (1); nevertheless the court was of opinion that the April contract, being a contract with a neutral, might continue in existence after the outbreak of war on the basis of suspension, during the war (2). Upon that footing, it was said, the benefit to the German company (and therefore to the enemy) became so vague and uncertain that no valid ground existed on which a British subject could be freed from his obligation to a neutral (3). My Lords, I confess I feel great difficulty in following this reasoning. By the very terms of the bargain struck between all the parties in February, and formally recorded as between Enskilda and the two companies in April, the further performance by the English company during the war, either of cl. 4 of the February contract (*eo nomine*) or of cl. 9 of the April contract (*eo nomine*), must inevitably result in a clear and direct benefit to the German company (which was stipulated for by the German company and assented to by Enskilda in order to obtain sterling), namely, a large reduction in the German company’s indebtedness of 84,000*l.* The four payments made before the war had already reduced it to 42,000*l.*, leaving outstanding a liability of 42,000*l.* The carrying out of the April contract during the war according to its terms would relieve the German company from a further liability of 16,800*l.* But the axe falls when war breaks out. At that moment there was nothing vague or uncertain about the benefit to the enemy which would result from carrying out the very terms of the bargain. All the necessary conditions existed for abrogation under the common law rule. Illegality does not suspend, it dissolves: see per Lord Sumner in *Ertel Bieber, & Co. v. Rio Tinto Co., Ltd.* (4). What justification then can there be for saying, we will not declare this contract to be abrogated because it is a contract with a neutral, but we will declare it to be only suspended, and then suspension will only involve a vague and uncertain benefit to the enemy, insufficient to justify freeing a British subject from his obligation to a neutral? I know of none, and can imagine none. Indeed, a fatal difficulty seems to arise. If a contract, the further performance of which (like this one) requires acts to be done on or before fixed dates, from the doing of which on those dates stated consequences clearly beneficial to the enemy are to flow, is *prima facie* abrogated at common law on the outbreak of war, it can be no answer to say

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(1) [1944] Ch. 32.

(3) *Ibid.* 28.(2) *Ibid.* 25, 26.

(4) [1918] A. C. 260, 285.

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that the contract need only be suspended during the war if the benefit to the enemy thereby becomes vague and uncertain, for you would by the suspension be substituting a new and different contract into which the parties had never entered: see e.g., *Distington Hematite Iron Co., Ltd. v. Possehl* (1).

The case for the respondent bank on the appeal before this House was argued on different grounds. It was conceded that contracts the further performance of which would confer upon the enemy an immediate or future benefit or involve intercourse with the enemy are abrogated on the outbreak of war. To quote Lord Dunedin in *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (2): "From these cases I draw the conclusion that upon
"the ground of public policy the continued existence of con-
"tractual relation between subjects and alien enemies or
"persons voluntarily residing in the enemy country which
"(1.) gives opportunities for the conveyance of information
"which may hurt the conduct of the war or (2.) may tend to
"increase the resources of the enemy or cripple the resources of
"the King's subjects, is obnoxious and prohibited by our law."

It was also conceded that the same principle would apply to a contract between British subjects, or between a British subject and a neutral if according to its very terms further performance of it would give the opportunity or tend to the increase indicated above. It was, however, contended that this contract fell within certain exceptions to the rule. That certain exceptions do exist is well established. To quote Lord Dunedin once more—he states the exceptions thus in *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (3): "There is indeed no such general
"proposition as that a state of war avoids all contracts between
"subjects and enemies. Accrued rights are not affected though
"the right of suing in respect thereof is suspended. Further
"there are certain contracts, particularly those which are really
"the concomitants of rights of property, which even so far as
"executory are not abrogated. Such as, for instance, the
"contract between landlord and tenant, of which an example
"may be found in the recent case of *Halsey v. Lowenfeld* (4)."

Thus a contract which is completely executed on one side, and under which nothing remains to be performed except payment to be made by the other of a liquidated sum whether already due, or debitum in præsentī solvendum in futuro, is unaffected by the outbreak of war. The payments cannot in

(1) [1916] 1 K. B. 811.

(3) Ibid. 269.

(2) [1918] A. C. 260, 274.

(4) [1916] 2 K. B. 707.

fact take place between enemies in war time ; so long as the war lasts the payment is suspended. Nor is enemy property confiscated at common law by the outbreak of war, and consequently contractual rights and obligations incidental to the ownership of property are not put an end to at common law by the outbreak of war. The enforcement of them during the war may be impossible, but they will survive the war.

It was first contended that the April contract fell within the exceptions because the April contract was a contract which was before the war wholly executed by Enskilda and under which nothing remained to be done by the English company except the payment of money. This was the main contention advanced by the respondent bank before us, and it is this contention which is adopted by those of your Lordships who favour the dismissal of this appeal. But this conclusion is reached on grounds, concerning the construction and effect of the April contract, which appear to me fundamentally wrong, and I feel bound to state in detail my reasons for so thinking. One ground is of this nature :—The payments to be made by the English company under the April contract are treated as payments made at the request of the German company, and it is then said that the English company would, independently of the provisions of cl. 8, and whether it paid as a surety or a principal, be entitled to reimbursement. Equity, it is said, would transfer to the English company the right vested in Enskilda to recover from the German company the amounts paid. The April contract added nothing in this respect ; cl. 8 conferred on the English company no right which it would not have obtained by the mere fact of making the specified payments. Surely this view is misconceived. That the English company entered into both the February contract and the April contract in obedience to the instructions of the German company, no one can doubt. But the right in Enskilda to receive, and the obligation on the English company to pay the instalments rest solely on the April contract. They are payments which will become payable by the English company to Enskilda before anything is payable to Enskilda by the principal debtor at all. Nor are they made by the English company as a surety, or at the request (express or implied) of the German company. They are made by the English company as a principal under compulsion of the April contract. Even if the pre-war instalments could (contrary to my view) be treated as being payments made at the request of the German company,

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no post-war instalment could possibly be treated as having been made at the request of an enemy. But for the existence of the April contract, there would have been no obligation on the English company to pay any of the "instalments"; any such payment would have been a purely voluntary act, creating no right, legal or equitable, in the payer. Even if the first portion of cl. 4 of the February contract was not (as between the parties to the April contract) superseded by cl. 8 of the April contract, but still remained binding, the legal position would remain unchanged. The English company would make the payments not as a surety, or at the request of someone who was indebted to the payee, but as a principal under the compulsion of a contract with the payee. Another ground is of this nature:— It is said that the provision in the April contract for the assignment of Enskilda's rights against the German company is only a provision as to the method of payment, that the April contract had been wholly executed by Enskilda before the outbreak of war, that Enskilda had then an accrued cause of action in debt for each instalment, that the tender of an executed assignment by Enskilda was a mere formality, and that Enskilda could sue for an instalment, if unpaid on the specified date, upon an allegation that Enskilda was always ready and willing to execute an assignment on payment. I cannot agree. It is, in my opinion, impossible to treat cl. 8 as a mere agreement to pay fixed amounts on stated dates, constituting debts to be paid on those dates, subject to the fulfilment by Enskilda of conditions. It is a contract to pay the instalments (I quote the words) "in consideration of the assignment by you to us " on the occasion of each such payment of a like sterling amount " of your claim against the German company." This is nothing but a contract for the sale and purchase of a number of choses in action on specified dates. As was pointed out in the judgment of the Master of the Rolls in the earlier litigation to which I have referred, *Stockholms Enskilda Bank Aktiebolag v. Schering, Ltd.* (1), the remedy thereunder would be not by action for debt, but by proceedings for specific performance of the contract of purchase, after execution and tender of a proper assignment of the subject matter of the purchase. When war broke out no cause of action had accrued to Enskilda in respect of post-war instalments. The only obligation to pay is on receipt of a tendered executed assignment of the property agreed to be sold; the only obligation to part with the property sold is

(1) [1941] 1 K. B. 424, 435, 436.

on receipt of the purchase price. A "ready and willing" plea may well be a proper and necessary plea in an action for breach of a contract, for the purpose of alleging and establishing that the plaintiff who sues for breach is not himself in breach. But we are here considering the position in relation to an action for the enforcement of this contract, not in relation to an action for its breach. In order to enforce it, Enskilda would have to sue for specific performance, and except upon allegation and proof of execution and tender of an assignment of the property sold, there would be no cause of action for the purchase money. In other words the April contract, so far from having been fully performed by Enskilda before the outbreak of war, remained completely executory on both sides in relation to the post-war instalments. On each instalment date each party had to complete the sale and purchase, Enskilda by delivering an assignment of the property sold in exchange for the purchase money, the English company by paying the purchase money in exchange for an assignment of the property sold.

Another argument advanced on behalf of the respondent bank was to the effect that so far as concerns that part of the April contract which deals with suretyship, Enskilda had wholly performed its part. It had complied with the request of the two companies, and had made over the marks to the German company which constituted the consideration for the suretyship and the carrying out of that obligation involved neither intercourse with nor benefit to the enemy. I have already drawn attention to the fact that in sober truth no consideration for the suretyship had moved from Enskilda to the two companies who had made no request; but assuming the truth of this fiction, it is in my opinion impossible to sever the April contract and to treat it as if there were two separate and independent contracts, one for suretyship and the other for the sale and purchase of Enskilda's claims against the German company. The April contract is one entire and essential constituent of a transaction between Enskilda and the German company. In order that the German company might induce Enskilda to let it have the reichsmarks for the reduced price of 50,400*l.* sterling, it was necessary that the two companies should under instructions from Germany, both guarantee the larger price up to 50,400*l.*, and agree to buy Enskilda's claims against the German company at prices in sterling sufficient to provide in sterling the reduced price of 50,400*l.* Unless this twofold liability had been undertaken by the two companies (as it was

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undertaken both in the February contract and the April contract) the bargain between Enskilda and the German company could not have been struck.

Reliance was also placed upon the exception which was described by Lord Dunedin in these words in *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (1): "Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated." I am not sure that I understood correctly one argument on this contention. I think that it was said that the April contract was a concomitant of the right of property which Enskilda had acquired by its contract with the German company. But that is not the kind of property to which Lord Dunedin refers. He is not referring to choses in action or contractual rights. He is referring to contracts such as covenants running with the land, the right to enforce which belongs to the owner for the time being of the land. The interest in the land is not confiscated at common law by the outbreak of war; the power to enforce the covenant cannot be exercised during the war, but when the war ends, the power of enforcement revives. It may be difficult to define with exactitude or exhaustively the class of "concomitants." Each case must be considered when occasion arises. But I am of opinion that the present case cannot be treated as a contract which is a concomitant of rights of property, within the exception.

Finally it was suggested that the existence of the security created by the April letter brought the case within this exception. This appears to me an argument which must fail. So far from the April contract being a concomitant of the right of property created by the security, it is the security which is a concomitant of or ancillary to the April contract; and the argument when brought to bedrock comes to this, that obligations which (if unsecured) would be abrogated at common law, are saved from this fate by the fact that security has been given for their performance. That will not do. With the disappearance of the obligations the security for their performance necessarily disappears as well. My Lords, I am in agreement with the views of Simonds J. on this part of the case. I agree with him when he says (2), that the simple question is whether the performance of the April contract after September 3, 1939, would benefit the enemy, by increasing

(1) [1918] A. C. 260, 269.

(2) (1943) 112 L. J. (Ch.) 138, 142.

his resources or crippling those of His Majesty's subjects. That it must do so is as he and the Court of Appeal thought, and as I think, plain : and I will add that it is equally plain that the pecuniary benefit to the German company was one of the very objects for which, in the first instance the February contract, and subsequently the April contract, were entered into. Whether the performance of the April contract would involve intercourse with the enemy, is a point with which I need not deal, but the course of dealing between the parties in the days of peace affords strong support for the view expressed by Simonds J. (1). I express however no view of my own, nor do I say anything on the question of frustration.

One cannot but regret the unsatisfactory outcome of the argument in this House. The appeal fails for reasons which differ from those which prevailed in the Court of Appeal and which differ inter se. To me two decisive points stand out crystal-clear, unanswered and, I venture to think, unanswerable : (1.) the April contract if performed in war-time, confers a distinct and immediate benefit on the enemy, and (2.) as regards post-war instalments it was at the outbreak of war wholly executory. I would allow this appeal, and restore the order which the Court of Appeal discharged.

LORD MACMILLAN (read by LORD PORTER). My Lords, Schering, Ltd., the plaintiffs and now the appellants in this action, claim that a contract with a Swedish Bank dated April 16, 1936, to which they were a party, ceased to be enforceable against them on the outbreak of war between this country and Germany on September 3, 1939. They base their claim on the ground that the further performance of the contract would be to the benefit of the King's enemies and that it has accordingly at common law become illegal and ought to be abrogated. The law as to the effect of the outbreak of war on subsisting contracts in which an enemy of this country is interested cannot be said to have reached a high degree of precision. It has to be gathered from a series of decisions, each of them concerned with the circumstances of a particular case, in which the principle involved has been progressively though not always consistently formulated. The root of the matter is that a country at war cannot allow transactions to proceed which are calculated to aid the enemy in the prosecution of hostilities. A subject of this country must have no truck with

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the enemy. It is illegal for him to do anything which may tend to increase the war potential of the enemy in goods, money, credit or information. The growing complexity of international transactions and the increasingly pervasive character of modern warfare have combined to render more difficult the problems which confront the common law in this sphere, with the result that the legislature has found it necessary to come to its aid by statutes relating to trading with the enemy, but with these statutes the present case has no concern.

I do not propose to narrate in detail the terms of the contract under challenge, for they are sufficiently set out in the judgments of the courts below and in the opinions of my noble and learned friends. I shall confine myself to drawing attention to the features of the transaction which in my view are material. I note in the first place that although no enemy subject is formally a party to the contract, the plaintiffs are a subsidiary, and entirely under the control of, a German company. It is only by way of compliment that I shall call them "the English company." Then I note that it is in consideration of the Swedish bank making an advance of 84,000*l.* sterling (to be made available in sperrmarks) to the German company that the English company, in association with another subsidiary of the German company registered in India, guarantee payment in sterling of the German company's debt to the Swedish bank to the extent of 50,400*l.* Next I find the English and the Indian companies jointly and severally undertaking as principals to make a series of fourteen payments to the Swedish bank of varying sums amounting cumulatively to 50,400*l.* at various dates between October 28, 1937, and April 28, 1944, in consideration of the assignment to the companies by the Swedish bank, on the occasion of each such payment, of a like sterling amount of the Swedish bank's claim against the German company. Each payment is to be a satisfaction pro tanto of the liability of the English and Indian companies under their guarantee and they are not to be liable to make such payment in so far as the amount in question has been paid by the German company or any other person or company. The April contract which it is sought to abrogate cannot be considered in isolation. It is part of a transaction which, as the respondents state in their printed case to this House, was "carried into effect by three agreements," viz., a previous February contract to which the German company was a party, the April contract now challenged and a

contract by letter of the same date as the April contract between the English company and the Swedish bank. It is accordingly necessary to a true appreciation of the position, as the respondents say, "to consider the terms of the February contract." From the February contract it appears that in respect of the Swedish bank placing at the disposal of the German company reichsmarks to the amount of the equivalent of 84,000*l.* sterling the German company is to stand indebted to the Swedish bank in a sum of 50,400*l.* free of interest repayable on the expiry of eight years and that the English and Indian companies are to acquire from the Swedish bank its claims against the German company by a series of instalment payments, being the same as those repeated in the April contract. If the English and Indian companies do not acquire the claim of the Swedish bank against the German company by paying the stipulated instalments then the "remission" or reduction of the principal debt of 84,000*l.* to 50,400*l.* is to "lapse rateably." Thus, if the English and Indian companies pay only the first instalment of 6,300*l.* the German company's debt to the Swedish company will be 73,500*l.* In point of fact, four instalments had been paid before the outbreak of war. Thereafter further payments during the war were, in other proceedings, declared illegal under the Trading with the Enemy Act, 1939.

When the transaction is seen in its entirety there can be no question that it was highly beneficial to the German company. As the managing director of the English company says in a letter to the Indian company—"this is an extremely interesting "business for Berlin." How can the contract of April, 1936, forming part as it does of this transaction highly beneficial to the enemy, be allowed to subsist after the outbreak of war? Lord Greene M.R. is in agreement with Simonds J. that the further performance of the contract during the war would be illegal at common law but differs from him on the question of abrogation, holding that the effect of the outbreak of war has been only to suspend the operation of the contract during hostilities (1). The Master of the Rolls lays stress on the fact that the April contract is a contract not with an enemy subject but with a neutral and is therefore deserving of specially considerate treatment (2). To my mind the question turns upon the nature of the transaction not upon the parties to it. I cannot do better than quote and adopt the words of my noble and learned friend Lord Russell of Killowen, then Russell J., in the

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(1) [1944] Ch. 13, 26.

(2) Ibid. 25.

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case of *In re Badische Co., Ltd.* (1): "Assume a contract between British subjects, but of such a nature that either its further performance involves intercourse with the enemy or its continued existence would confer upon the enemy an immediate or future benefit. Does such a contract become void on the ground of illegality upon the outbreak of war? The illegality being based upon considerations of public policy I can see no reason why a contract of such a nature should not become void on the outbreak of war, irrespective of any question whether the parties thereto are enemies or friends. The test should be in my opinion, not whether one of the parties to the contract is an enemy, but whether the contract involves intercourse with the enemy or confers an immediate or future benefit on the enemy." I have already pointed out that although the German company was not formally a party to the April contract it was a party to the transaction of which that contract forms a part, but, agreeing with Lord Russell of Killowen, I think that the question is one not of parties but of substance. Applying his test I ask whether the contract involves intercourse with the enemy or confers an immediate or future benefit on the enemy. Not much was made by the appellants of the point of intercourse although I think that Simonds J. was justified in his view (2) that in the execution of the contract communication between the English company and the German company would in ordinary course inevitably have taken place, especially in view of the fact that the English company is not to be liable to pay any instalment to the Swedish Bank "in so far as the amount in question has been paid by the German company or any other person or company." The main point, however, is whether the contract confers an immediate or future benefit on the German company. It plainly does. Every instalment paid by the English company to the Swedish bank not only discharges pro tanto the liability of the German company to the Swedish bank, substituting a corresponding liability to the German company's own subsidiary in England, but also earns for the German company a substantial discount or rebate of their capital indebtedness to the Swedish bank. Each instalment as it is paid by the English company to the Swedish bank progressively improves the financial position of the German company by diminishing its liabilities. That being so, I cannot see how the contract can be allowed to stand. The argument of the Master of the Rolls in his very full discussion

(1) [1921] 2 Ch. 331, 373, 374.

(2) 112 L. J. (Ch.) 138, 142.

of the problem does not convince me. He agrees with Simonds J. that the further performance of the contract during the war "must benefit the enemy," (1) yet he says (2) that "it cannot be the case that a contract with a neutral is abrogated on the outbreak of war merely because its performance or existence is detrimental to this country." With all respect, I regard as vital in the light of the authorities the fact that the continued performance or the continued existence of a contract after the outbreak of war is beneficial to the enemy and detrimental to this country; and I do not agree that the possibility of benefit accruing to the enemy is in the present case vague or speculative. It seems to me very real. Sir Arnold McNair, in his learned treatise on the Legal Effects of War 2nd ed., p. 238, to which I express my indebtedness, finds "the clue" to the decision of the Court of Appeal in the present case in their view that the contract on the outbreak of war was an executed and not an executory contract. He is probably right. "In the case of an executory contract with an enemy," says the Master of the Rolls (3), "it is not merely performance so long as the state of war persists that is prohibited. The whole contract is abrogated. The reason for this is that, even if performance were postponed until after the war, the mere existence of the contract during the war might benefit the enemy by, for example, improving his credit or assisting him in his prosecution of the war by the knowledge that after the war the contract will remain on foot for his benefit." Subject to the observation that this doctrine applies not only to contracts with the enemy but also to contracts between British subjects and neutrals or between British subjects themselves if they may benefit the enemy, the proposition is clearly well-founded. But the Master of the Rolls finds it inapplicable to the present case inasmuch as in his view the contract was executed and not executory. The Swedish bank had before the war handed over the stipulated marks to the German company; it had done all that was incumbent upon it; nothing remained for it but that it should receive payment. This, it is said, is an accrued right, acquired before the outbreak of war and accrued rights as Lord Dunedin has pointed out, "are not affected, though the right of suing in respect thereof is suspended." (*Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (4). I cannot agree with this account of the matter. The distinction between an

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(1) [1944] Ch. 13, 33.

(2) Ibid. 35.

(3) Ibid. 24.

(4) [1918] A. C. 260, 269.

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executed and an executory contract is not always easy to draw but I do not regard the present contract as having ceased to be executory before the outbreak of war. The whole transaction and in particular the consequences of payment by the English company to the Swedish bank were very special. As each instalment payable by the English company fell due and was paid, assuming that it had not been paid by the German company or otherwise, the Swedish bank was bound to grant an assignment to the English company of a like sterling amount of their "claims against the German company." This has reference to the description in the February contract of the contemplated procedure as a progressive acquisition by the English and Indian companies of the Swedish bank's claims against the German company by instalments. As each instalment is paid, a pro tanto discount is to be granted by the Swedish company to the German company on its principal debt of 84,000*l.* It is by no means a simple case of the Swedish bank having an accrued right to a liquidated sum of money, as to which it had nothing more to do than to collect what was due to it. Suspension may be appropriate in the case of an accrued right. It means that the contract is not affected by the war and only the right to exact performance of the accrued obligation is in abeyance. Accrued rights are not forfeited at common law because the common law does not confiscate enemy property in this country. But where as here benefit would accrue to the enemy during the war as a consequence of the further performance of the contract, the contract in my opinion becomes illegal on grounds of public policy on the outbreak of war, and is abrogated. I am accordingly in favour of allowing the appeal and restoring the judgment of Simonds J.

LORD PORTER. My Lords, I have found the solution of this case a matter of difficulty, primarily I think because of the complexity of the arrangements between the parties and the necessity of safeguarding the rights of neutrals whilst not diminishing the ability of this country to preserve its interests in time of war. It is, no doubt, generally true that the further performance of contracts made before the outbreak of war and not fully performed on either side is prohibited as contrary to public policy provided that such performance involves intercourse with an enemy or benefits him. For the sake of brevity I speak of this result as abrogation of the contract though the contract itself is not abrogated, but further performance

alone forbidden. There are however exceptions and limitations upon this doctrine. So far at any rate as concerns benefit to the enemy, the further performance of contracts which have been completely performed on one side and in which all that remains is payment by the other are suspended, not dissolved, and in the same category are to be placed certain contracts particularly those which are really concomitants of the rights of property though still executory: see per Lord Dunedin in *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (1). In each case therefore before deciding whether a contract is abrogated or merely suspended on the outbreak of war it is essential to determine its exact construction and effect.

In the present instance there are four documents which must be considered. (1.) A contract, dated February 24 and 28, 1936, originally in German of which your Lordships have been furnished with an English translation. This, headed "Contract of Debt," is made between the respondent bank, as creditors of the one part and a German company the Schering-Kahlbaum Aktiengesellschaft of Berlin as debtor of the other part. The appellants and the Schering-Kahlbaum India, Ltd. of Bombay called the sureties are also parties; (2.) A contract dated April 16, 1936, made between the respondent bank, the appellants and the Schering-Kahlbaum India, Ltd.; (3.) A contract between the respondent bank and the appellants contained in a letter, dated April 16, 1936; and (4.) A letter, dated March 17, 1936, written by the respondent bank to Schering-Kahlbaum A. G. modifying the terms of the contract of February in so far as those two companies were concerned but to which the appellants were not parties. (1.) By the first of these contracts the respondent bank, as I think, undertook to provide reichsmarks of the value of 84,000*l.* at the rate of exchange current in Berlin on the day when the reichsmarks were handed over in return for the promise of repayment by the German company, in eight years time, of that sum in sterling or, if that was impossible, in blocked marks at the rate of exchange current in Berlin for payment in London at the date of repayment. For the repayment of this sum the English and Indian companies became sureties to the extent of 50,400*l.* and bound themselves as principals to repay it with the proviso that they should have credit for all repayments by themselves or the German company or third persons. Clause 4 contained certain special terms

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under which the sureties were to acquire the claims of the respondent against the German company "with the proviso "that" (by which I understand is meant, "provided that") they should pay at stated intervals, terminating after eight years, certain fixed instalments amounting in all to 50,400*l.* 50,400*l.* is 60 per cent. of 84,000*l.* and if and to the extent that these payments were made at the agreed dates the German company was to enjoy the remission of the extra 40 per cent., but if prompt payment of any one instalment was not made the German company was to cease to have this remission in respect of any sums still due, and was to pay the remitted and unremitted portions at the end of the eight years. In my view this clause gave the sureties an option to furnish the stipulated instalments if they chose but did not compel them to do so. It is however as I think, unnecessary to determine whether it was left to them to pay or not to pay or whether they obliged themselves to make the payments. In case the German company or the sureties should become bankrupt or should make an arrangement with their creditors the debt became immediately payable and, whereas the relationship between the German company and the respondent bank was to be governed by German law, that between it and the sureties was to be governed by English law. The marks to be supplied were sperrmarks for internal use in Germany and the actual value in a European market may well have been nearer to 50,400*l.* than to their nominal value of 84,000*l.*, but this consideration is, I think, immaterial. (2.) On April 16 of the same year two further contracts were entered into apparently to clarify the position and possibly to make what had been only an option in the earlier contract obligatory for the sureties. The first of these two contracts was between the sureties and the respondent bank and by its first seven clauses guaranteed payment of 50,400*l.* out of the 84,000*l.* advanced to the German company. Clause 8 contained a joint and several undertaking by the sureties as principals and not as guarantors to make the payments stipulated in the earlier contract at the appointed dates in consideration of the assignment on the occasion of each payment of a like sterling amount of the Swedish company's claim against the German company. Clause 9 contained the proviso that each payment by the sureties should satisfy pro tanto their liabilities under the guarantees and that they should not be liable to make any of the payments stipulated in whole or in part in so far as they

had been paid by the German company or from any other source. Default in payment of any one instalment was not to accelerate the date for payment of another and the agreement was to be governed by English law. It contained no provision for any remission in the amount to be paid by the German company as a result of the prompt payment of the stipulated instalments. (3.) The second of the two contracts of April 16 was made between the appellants and respondent bank only and provided for the retention in the hands of trustees of certain goods the property of the English company in order to furnish security for their due fulfilment of the other April contract. The release of the goods held under it forms part of the claim in this action, but in my view this contract itself is not otherwise material. (4.) The fourth contract is of more importance. It is made between the appellants and the German company only and is, so far as that company is concerned, a modification of that part of the first contract which stipulated that non-payment at the due date of any one of the instalments by the sureties should deprive the German company of all future remissions. Under the new arrangement, as I understand it, failure to pay an instalment on the part of the sureties was no longer to prove fatal to the remission: in future any payment from any source, including a recovery by execution upon the property of the sureties, was to keep it alive. The time by which these recoveries were to be made is not stipulated.

In these circumstances it is said by the appellants that they are absolved by the outbreak of war from any future performance of their obligation to pay the instalments payable after that date, are entitled to have the goods held as security for their guarantee released and are freed from their obligation as sureties to pay the sum of 50,400*l.* The actual relief claimed is a declaration that the April contract can no longer be enforced against the appellants and an order for the release of the security. Strictly speaking it might be contended that the German company was not a party to either of the April contracts and that neither of them contained any term which would benefit the German company unless it could be said that the assignment of their debt to the respondent bank in favour of the appellants portion by portion as the instalments were paid brought about this result inasmuch as the respondent bank might recover it from the German company at the end of the eight years if it were still due to them, but so long as England and Germany were at war, the appellants could not do so.

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So also it might be contended that the sureties were not parties to the fourth contract and therefore, so far as concerned any contract to which they were parties, the right to remission ceased when it was held (as it was held by the Court of Appeal in *Stockholms Enskilda Bank Aktiebolag v. Schering Ltd.* (1)) that it was illegal to pay the instalments whilst England and Germany were at war and when consequently they were not paid at the due dates. These suggestions however in my opinion take too narrow a view of the contracts between the parties. Their relationship must, I think, be judged by the agreements as a whole and indeed the case was so argued before your Lordships. But though the consideration of the problem must be approached in this way I do not think it proper to neglect the form of the contract between the parties or the development of the arrangements which finally took shape in four separate sets of provisions, none of which purported to put an end to those which preceded them.

What then are the principles to be considered? It is not true to say as a general proposition that a state of war avoids all contracts even between subjects and enemies: see per Lord Dunedin in *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (2). One such exception at any rate is the case of an executed contract where all that remains to be done is the payment of money by a subject of this country to an enemy: see *Ottoman Bank v. Jebara* (3), where it is said: "It is not every contract that is abrogated by the war; it is only a contract which is still executory and which for its execution requires intercourse between the English subject and the enemy." It was said that the present contract was still executory and necessitated intercourse with the enemy, since the appellants would require to ascertain from the German company what, if any, payments it had made. I see no reason for such intercourse; the appellants could and would in the normal course ask the respondent bank what payments had been received from the enemy or other persons and need not make any inquiries of the enemy and the same considerations are equally true of the appellants' obligations as surety. Whether the contract was still executory or not I leave for consideration later on. But executory contracts with an enemy are not dissolved only where they involve intercourse: they are also dissolved where they "may tend to increase the resources of the enemy or

(1) [1941] 1 K. B. 424.

(3) [1928] A. C. 269, 276.

(2) [1918] A. C. 260, 269.

“cripple the resources of the King’s subjects”: see per Lord Dunedin in *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (1). In the contract under consideration there does not appear to be any question of crippling the resources of the King’s subjects, but four questions remain: (1.) is this an executed contract, i.e., one which has been wholly performed on one side? (2.) does it bring any substantial advantage to the enemy? (3.) is it one of the class which, executory or executed, is excepted from those abrogated by war, and in any case? (4.) is it wholly abrogated by the existence of a state of war between Great Britain and Germany?

(1.) So far as concerns any obligation to the German company, the respondent bank have performed their contract in full. They had to provide and they have provided 84,000*l.* worth of reichsmarks: all that remained was for the German company to perform its part by paying its debt to whoever was found to be entitled in 1944. They had however still to receive from the appellants or from elsewhere the remainder of the instalments and in return for any payments by the appellants to give the partial assignments of the German company’s debt. That part of the April contract therefore which stipulated for the payment of 50,400*l.* by instalments was wholly executed on the respondent bank’s side as between them and the German company, but is still uncompleted as between the respondent bank and the appellants to the extent that the rest of the instalments have still to be paid and the rest of the debt to be assigned.

(2.) There is no certainty of benefit to the German company but the contract makes provision for it. By the earlier case between the same parties already referred to it was held by the Court of Appeal that the payment of any of the instalments was an offence under the Trading with the Enemy Act, 1939, as it would result in (i.) the respondent bank having financial dealings for the benefit of an enemy within s. 1, sub-s. 2 (a) of the Act; (ii.) making a payment for the benefit of an enemy within sub-s. 2 (a) (ii.); and (iii.) discharging an obligation of an enemy within sub-s. 2 (a) (iii.). The decision was a decision with regard to certain instalments then due under the provisions of the February and the April agreements and was arrived at by a consideration of the wording of the Act of 1939. It does not deal with the position at common law now in dispute before your Lordships’ House. As however the instalments were not paid at the dates prescribed the German company would have

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lost the remission had the original agreement of February not been modified. It was modified by the letter of March 17, 1936, which altered the rights of the German company as to remission of the sum of 33,600*l.*, i.e., 40 per cent. of the original debt. Whereas by the original agreement failure on the part of the sureties to pay the instalments on the prescribed dates would have prevented the German company from obtaining any remission after the date of such failure, the result of the March agreement was that the remission would not be forfeited unless the respondent bank were not satisfied by payment from third parties or by execution on the sureties' property or in some other way in full. The agreement is obscurely expressed and nowhere stipulates a date by which this repayment has to be made but the reference to execution suggests that repayment at the prescribed time or even immediately after the accruing of the German company's obligation to pay the whole sum was not required. It was not contended that the right to earn the remission was lost provided that payment was made at or before the eight years intromission, granted by the contracts to the German company had elapsed, and having regard to the provision as to "execution" I should myself say that some additional time after that date must be allowed. What additional time is permissible it is perhaps unnecessary to determine. The result of the change would therefore appear to be that the German company was to have the advantage of this remission if from any source or by any means the respondent bank were to obtain payment of 50,400*l.* within a reasonable time after April, 1944. In these circumstances the German company was said to derive two benefits from the continued existence of the contract (1.) a transfer of the liability of the German company to repay the respondent bank to a liability by that company to repay the English or Indian companies, (2.) an undertaking by the English company to pay at some unspecified time instalments which if made in time, would ensure remission, whether the German company paid or not, whereas the German company might be unable or unwilling to repay in time and so would fail to avoid liability for the larger payment to the respondents or their assigns. If this be the position, the question to be determined is whether these contracts are abrogated on the ground that they may benefit the enemy if the instalments are duly paid, though fulfilment of the guarantee may not be open to any objection.

(3.) Admittedly contracts which are wholly performed on one

side and certain contracts which are really the concomitants of rights of property are not abrogated by war and this is true of the latter even though they are still executory on both sides. There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. "Accrued rights are not affected though the right of suing in "respect thereof is suspended" are Lord Dunedin's words in *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (1). In the present case the respondent bank had fulfilled all their obligations to the German company: they had handed over reichsmarks of the nominal value of 84,000*l.* It is true that they had still to tender to the appellants an assignment of part of the debt in return for the payment of each instalment, and one view of the transaction is that the suretyship was only one and that an incidental part of the agreement. On this view the substance of the matter was that the English company had not contracted to repay the loan which the respondent bank had made to the German company but had agreed to purchase assignments of parts of the German indebtedness by payments of stipulated sums at stated times. This view, in my opinion, lays too great stress upon the contract of April 16 to the exclusion of the original agreement of February and the letter of March 17 which modifies its terms. Unless it be conceded, and I see no reason for the concession, that the April contract, by inference, put an end to the February agreement the abrogation of the former would still leave the latter in force. Indeed it is I think, impossible to say that the February contract was superseded. If it were, there would be no provision for remission and no corresponding benefit to the German company. The most that can be said is that it modifies it. Moreover, though the March letter is, as I have said, obscurely worded, yet it apparently enables the German company to earn the remission by means of a payment made by it or by some one on its behalf even up to or possibly beyond the date on which the German company was under contract to repay the loan.

(4.) In these circumstances I think that the arrangement between the parties was not merely or substantially a purchase by the appellants of portions of a debt in which they were not otherwise interested. Rather I think it was a stipulation for repayment of a sum of money lent to the German company at, as the April contract states, the request of the appellants and the associated Indian company, on their undertaking to stand

(1) [1918] A. C. 260, 269.

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surety for its ultimate payment, coupled however with an additional obligation to pay by instalments in consideration of an assignment of portions of the debt. In considering its import one has therefore to remember that the appellants were not merely under contract to pay by instalments but were also and, as I think, primarily guarantors of the debt. Indeed in my view they were bound, so far as the February contract was concerned, only to act as surety though given an option to earn remission of part of the debt by paying off 60 per cent. of it at earlier agreed dates. So regarded an important element in the matter was repayment not purchase; the contract was not simply an agreement to sell and purchase instalments of a debt but to repay the money advanced to the German company. The whole method by which the negotiation was arranged and the form which it took appears to me to bear out this view. Originally there was an obligation of suretyship with an option to make advance payments and take assignments of portions of the debt in return. This was followed by a continuance of the suretyship but with an obligation instead of an option to make payments in advance of the time when the Germans must repay. This again was modified so that the incentive to prior payment was removed, since the obligation to fulfil the contract of suretyship and the right to earn remission coincided in time, whereas originally remission was lost if punctual payment of the prescribed instalments was not made. In a conflict of views as to whether the contract was primarily for payment of a debt or purchase of portions of it, I ask myself what in substance the final bargain was. One thing is certain: the contract, so far as it was a contract of guarantee, has been fully performed on the part of the respondent bank and they have nothing more to do than require the guarantee to be implemented. If the contract as a whole is declared to be abrogated—and by the contract as a whole I mean not only the April contract of which alone abrogation is claimed, but also the February contract and the March letter as regards which no claim is made—then the guarantee as well as the contract to pay by instalments is gone. I see no reason for so drastic a step. The fulfilment of the guarantee can give no benefit to the German company, beyond that existing in every case where there remains no obligation except the payment of a debt due presently or in the future. Such an obligation, it is conceded, is suspended not abrogated. The question of the right of the respondent bank to claim payment of the instalments is now academic; the time for payment

by the German company has arrived and a claim on the guarantee can be made, unless guarantee and instalments are abrogated together. For the reasons I have given I do not think they are. There remains only the fact that the neutral might sue at a date when the Englishman being still at war could not do so. I do not think this is enough to dissolve the contract, if it were then any assignment of an enemy debt to a British national in time of war by a neutral would be invalid, since the result would prevent any immediate recovery—a consequence which would appear at least unlikely.

I agree with my noble and learned friend Lord Thankerton that there is no ground for applying the doctrine of frustration. The agreement is, as I think, a very special one and I cannot say that I have found the solution other than difficult. Nevertheless for the reasons which I have stated, I would dismiss the appeal.

LORD GODDARD. My Lords, but for the fact that there is a difference of opinion among your Lordships I should content myself with saying that I entirely agree with the opinion of my noble and learned friend Lord Thankerton which I have had the advantage of reading. As however there is a difference I will very briefly state in my own words my reasons for thinking that this appeal should be dismissed. It is unnecessary for me to set out the terms of the various documents which give rise to this action, as they have been fully dealt with in the opinions of those of your Lordships who have preceded me. In my opinion it is not open to question that where one party to a contract has fully performed his part and all that remains is that the other party has to pay a sum of money, the contract is executed and no longer executory. That payment is to be made by instalments is immaterial, nor in my opinion does it make any difference that in the present case the appellants were entitled to assignments of the respondent bank's claim against the German company. A surety who pays the debt is entitled without any assignment to indemnity from the principal debtor just as he is entitled to have the security, if any, transferred to him by the creditor. So too if a payment is made by one, not as surety, but at the request express or implied of another, the former is entitled to recover the amount from the latter on the common count for money paid for and at his request.

There can be no doubt that in making payments which, as

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between themselves and the respondent bank they did as principals, the appellants were acting on the implied request of the German company, who were all along parties to the main transaction. Indeed, it seems to me that so far as their obligation to pay is concerned, the April contract added nothing to what had already been undertaken by the appellants under the February contract. I therefore regard the contract between the appellants and respondent bank as executed, and one which gave rise to a debt incurred when the marks were put at the disposal of the German company. In the events which happened the debt was therefore incurred under a contract made before the war and it was payable in part before and in part after the outbreak. A series of cases has firmly established that war does not abrogate or discharge a debt incurred before the declaration, though the obligation to pay and the right to recover are suspended during the war. An early example is *Ex parte Boussmaker* (1). A petition was there presented on behalf of an enemy to prove a debt in bankruptcy. Lord Erskine L.C. said: "If the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue: but, the contract being originally good, upon the return of peace the right would survive." "It would be contrary to justice to confiscate this dividend." He allowed the proof, but directed that the dividend should be reserved. In *Flinndt v. Waters* (2), a policy of marine insurance had been effected on goods and a loss incurred before the owners of the goods became enemies. Lord Ellenborough said: "The insurance, the loss, and cause of action had arisen before the assured had become alien enemies: when therefore they became such, it was only a temporary suspense of their own right of suit in the courts here, as alien enemies." That case was expressly approved by Lord Lindley in *Janson v. Driefontein Consolidated Mines, Ltd.* (3). Coming to more recent times, in *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* (4), Lord Dunedin held that accrued rights were not abrogated by war, and in *Ottoman Bank v. Jebara* (5), the same noble and learned Lord said: "It is not every contract that is abrogated by the war; it is only a contract which is still executory and which for its execution requires" (I emphasize that word) "intercourse between the English subject and the enemy."

(1) (1806) 13 Ves. 71.

(2) (1812) 15 East 260, 266.

(3) [1902] A. C. 484.

(4) [1918] A. C. 260, 269.

(5) [1928] A. C. 269, 276.

I take it therefore to be well settled that the effect of war upon a debt arising out of a contract made before the war is to suspend the right of action and not to abrogate or discharge the debt. The present is a true case of debitum in præsentī solvendum in futuro ; the cause of action, the debt, is unaffected ; the right of action is postponed till after the war. If this is true of a debt due to an enemy, it must a fortiori be so of one due to a neutral, though I agree that in matters relating to trading with the enemy there is no room for more tender treatment of the one than the other. There is this difference, that by reason of the Trading with the Enemy Act, 1939, had the debt been due to an enemy it would have had to be paid to the custodian of enemy property, while in the case of a neutral the money will remain with the debtor to be paid by him to the neutral at the end of the war. In passing one may observe that the fact that this Act makes debts payable to the custodian shows that the legislature recognized that they were not abrogated, for there is nothing in the Act to revive debts or obligations which had become abrogated by operation of law. But it is said that there is here an overriding consideration, namely, that the payment will preserve the remission of 40 per cent. for the benefit of the German debtor. It is beyond question that if the result of performance of a contract would be beneficial to the enemy or detrimental to this country the further performance is forbidden and the contract abrogated, though again rights, such as debts, accrued before the war are unaffected. This is illustrated by the order in the *Ertel Bieber* case (1) made by the Court of Appeal and affirmed in this House and which your Lordships have seen in the printed book. Now one of the reasons why a suspensory clause to operate in the event of war in a contract for the sale of goods to an enemy will not save the performance of the contract from abrogation as illegal is that to ensure to an enemy a supply of goods or raw material after the war is or may be to enhance his resources during the war. If this consideration were taken to its full logical extent it might be said to apply to debts, as it would certainly be of some benefit to an enemy to have an English debt remaining due to him even though it is not payable till the end of the war. He might be able to raise money from neutrals upon an assignment of his rights which could be enforced at the conclusion of the war. But this doctrine never has been applied to debts arising out of previous contracts, and I am not prepared now for the first time to apply it and to hold

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that accrued causes of action are destroyed and not suspended because otherwise an enemy might obtain a discount or some other benefit by reason of the continued existence of the obligation. The matter cannot, I agree, be tested by considering whether a benefit must or only may result, and I do not therefore discuss the true meaning of cl. 4 of the February contract as amended by the March letter, which is certainly somewhat obscure. It may be that by the application of German law which governs the contract between the German company and the respondent bank the former has lost the benefit of the discount as the instalments have not been paid ; but the matter must be determined on the rights of the parties as they existed on September 3, 1939, and I base my opinion on the grounds which I have already stated. It was also submitted that the contract was still executory because of the provision for the assignment by the respondent bank to the appellants of their rights against the German company. I regard this as no more than a provision as to the method of payment, and perhaps as some additional precaution, and as I have already said, whether the appellants paid as sureties or as principals, in either case they would without any assignment be entitled to reimbursement though in this particular case the right to reimbursement could not be enforced till the expiration of eight years from the date of the agreement. I do not agree with the opinion expressed by the Court of Appeal in the former action brought by the respondent bank, that their true remedy was by an action for specific performance. I think they could, but for the war, have sued at law, alleging either that they had made tender of an assignment or that they were always ready and willing to execute one on payment. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant company : *Kenneth Brown, Baker, Baker.*

Solicitors for respondent bank : *Slaughter & May.*

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[PRIVY COUNCIL.]

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND
OF CEYLON.

*Ceylon—Appeal—Waste Lands Ordinance, No. 1 of 1897, ss. 18, 20—
Claim made under s. 20—Order of District Court—Right of appeal
to Supreme Court under s. 18—"Decision or order" included in
"trial."*

By s. 20 of the Waste Lands Ordinance, 1897, it was provided, inter alia, that "the foregoing provisions of this Ordinance shall be "applicable to the investigation and trial" of a claim to land made under that section :—

Held, that the word "trial" in its context included "decision," and that the expression "investigation and trial" was descriptive of the whole proceedings, and accordingly an order of the District Judge made under s. 20 was appealable to the Supreme Court of Ceylon by virtue of s. 18 of the Ordinance, which gave a right of appeal from the "order or decision" of the District Judge where a petition of appeal was lodged within thirty days of the date of the order or decision.

Decree of the Supreme Court of Ceylon (1942) 43 C. N. L. R. 230, reversed.

APPEAL (No. 78 of 1944), by special leave, from a judgment and decree of the Supreme Court of Ceylon (March 4, 1942), which had dismissed, on a preliminary objection taken by the respondent to the competency of the appeal, an appeal from an order and decree of the District Court of Ratnapura (October 30, 1941), whereby a claim by the appellants, acting as executors of the estate of one Antoine Joseph Vander Poorten, deceased, to certain lands which had been declared to be the property of the Crown, had been dismissed.

The following facts are taken from the judgment of the Judicial Committee: The only question for determination in this appeal was whether the Supreme Court of Ceylon was right in holding that no appeal lay to that court against the dismissal by a District Judge of a petition which, for the purpose of dealing with the preliminary objection that the

* *Present*: LORD MACMILLAN, LORD DU PARCQ and SIR JOHN BEAUMONT.

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appeal could not be entertained, the court treated as a "claim" made under s. 20 of the Waste Lands Ordinance, No. 1 of 1897.

The facts relevant to that single question were few, and could be shortly stated. The Ordinance of 1897 empowered the government agent to declare by a notice duly published that any lands which appeared to him to be waste lands should be deemed the property of the Crown unless a claim was made to them within three months from a date specified in the notice, and further enacted that if no such claim were made the lands should be declared to be the property of the Crown. On September 21, 1928, such a notice was published in respect of the lands which were the subject of the present suit. No claim was made within the period of three months, which began to run on the date of the notice, but before the lands had been declared to be Crown lands the Ordinance of 1897 had been repealed by the Land Settlement Ordinance of 1931, which provided for the appointment of Settlement Officers, and in terms authorized any such officer to continue or to complete any action or proceeding taken or commenced under Ordinance No. 1 of 1897. On April 5, 1940, an Assistant Settlement Officer published a notice under the Land Settlement Ordinance by which he ordered that the lands in question should be settled as therein specified, thus dealing with them as Crown property.

Meanwhile, one A. J. Vander Poorten, since deceased, whose executors were the present appellants, had written to the Land Settlement Officer on January 30, 1931, saying that he held the lands in question "in trust for" one Meedeniya and that the same might be settled on him in spite of the writer "being nominal owner," and, later, namely, on February 26, 1937, by which date Meedeniya had died, he was said by the appellants to have intimated to the Settlement Officer that he withdrew the earlier letter, and to have set up his own claim to the lands. A. J. Vander Poorten died on or about December 28, 1937.

On December 5, 1940, the appellants, purporting to proceed under the Land Settlement Ordinance, presented a petition to the District Court of Ratnapura praying that the lands now in question should be transferred to them as executors of A. J. Vander Poorten. It was conceded by counsel for the appellants before the Supreme Court that, by reason of the terms of s. 6, sub-s. 3 (c), of the Interpretation Ordinance

(ch. 2), they had erred in proceeding under the Land Settlement Ordinance, and that any claim which they might have should have been brought under the Waste Lands Ordinance of 1897. The learned District Judge dismissed the petition on the ground that the petitioners were not entitled to relief under the Land Settlement Ordinance. In the course of his judgment he said: "Even if it could be said that the remedy provided for by s. 20 of the Waste Lands Ordinance was available to the petitioners in spite of this Ordinance having been repealed the petitioners seem to be out of time now."

Section 20 of the Waste Lands Ordinance of 1897 was as follows:—"No claim to any land or to compensation or damages in respect of any land declared to be the property of the Crown under the provisions of this Ordinance shall be received after the expiration of one year from the date on which such declaration shall have been made. If within such year any claimant shall prefer a claim to such land or to compensation or damages in respect thereof before the Commissioner appointed under this Ordinance for the province in which such land is situated, or in the event of no Commissioner being appointed, before the District Judge of the district in which such land is situated, and shall show good and sufficient reason for not having preferred his claim to the Government Agent or Assistant Government Agent as aforesaid within the period limited under s. 1 of this Ordinance, such Commissioner or Judge shall file the claim, making the claimant plaintiff and the Government Agent or Assistant Government Agent as aforesaid defendant on behalf of the Crown in the action, and the foregoing provisions of this Ordinance shall be applicable to the investigation and trial thereof."

The petitioners appealed to the Supreme Court, who dismissed their appeal without going into the merits of the case. Keuneman J., with whose judgment Hearne J. concurred, after holding that the appellants (as their counsel had admitted) could not avail themselves of the Land Settlement Ordinance, stated the question which now arose for decision as follows:—"Counsel for the appellants, however, contends that this petition constitutes a good and sufficient claim under s. 20 of the Waste Lands Ordinance, and that the District Judge should have so treated it. He is met by the objection that no appeal lies from an order made under this section, but counters this by arguing that the words in s. 20 'the

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“ “ foregoing provisions of this Ordinance shall be applicable
“ “ to the investigation and trial thereof ’ bring in the right
“ of appeal under s. 18.” The learned judge rejected that
interpretation of s. 20, and the court adjudged that the
appeal should be dismissed by reason of the preliminary
objection, and decreed accordingly. The present appeal was
brought against that decree by leave of His Majesty in Council.

1946. Feb. 12, 13, 14. *Rewcastle K.C.* and *Handoo* for the appellants. The appellants say that, contrary to law, reason and justice, lands of which Vander Poorten was the registered owner have been declared to be the property of the Crown, notwithstanding that long before the declaration was made the Settlement Officer who made it had notice that Vander Poorten was the owner of the lands and that they were cultivated and not vacant lands or lands without an owner (i.e., lands of the kind with regard to which alone the 1897 Ordinance empowered the Settlement Officer to make a declaration of this kind) and without the merits of Vander Poorten’s claim having been investigated in any way. Nobody at any time has dealt with the facts or the merits of the case. The settlement notice of September 21, 1928, under the Waste Lands Ordinance, was applicable only to waste lands etc., and not to cultivated land; secondly, the procedure should be conducted with reasonable rapidity, for it is obviously undesirable that the land, which is sterilized while claims are awaited, should be sterilized for longer than is necessary. The authorities should have acted with reasonable promptitude, and not left the matter hanging over from 1931 to 1940. It is conceded that the petition of the appellants in the District Court was wrongly founded on s. 24 of the 1931 Ordinance, but it is contended that it should nevertheless have been investigated and tried by the District Court as a good and sufficient “ claim ” to the lands in question under s. 20 of the 1897 Ordinance. “ Investigation ” in s. 20 includes an investigation by the court of appeal, and the word “ trial ” includes the decision or order of the District Judge on the claim and carries a right of appeal by virtue of s. 18, which is one of the “ foregoing provisions.” On a true interpretation, therefore, of s. 20 and the “ foregoing provisions ” of the 1897 Ordinance an appeal lay to the Supreme Court from the refusal of the District Court to investigate and try the appellants’ claims. Alternatively, it is submitted that an

appeal to the Supreme Court was competent by virtue of the provisions of s. 73 of the Courts Ordinance ; that section seems to be a perfectly general provision, and the words " judgment, " decree, or order " therein cover the general word " decision. "

There are two authorities of this Board, completely in the appellants' favour, which bear on the question whether there is an appeal under the Courts Ordinance : *Hem Singh v. Das* (1) and *Secretary of State for India v. Chelikani Rama Rao* (2) ; they deal with statutes much the same as this.

Le Quesne K.C. and *S. E. Pocock* for the respondent. The District Judge in a matter of this sort is not acting in his ordinary capacity under the Courts Ordinance, but in a special or ad hoc capacity under the Waste Lands Ordinance or the Land Settlement Ordinance ; he is a persona designata and there is no right of appeal. Apart from the application of the " foregoing provisions " in s. 20 there cannot be found a provision at this stage giving a right of appeal. Then, turning to those words, " the foregoing provisions of this Ordinance " shall be applicable to the investigation and trial, " it is submitted that having regard to how these words " investigation and trial " have been used in previous sections of this same Ordinance the conclusion is reached that they must be limited to trial before the District Judge : ss. 9, 10, 11 and 17. In view of what is found in those sections the right view is that " investigation and trial " mean what is going to be done in the court of first instance, and does not relate to the Supreme Court. Also, the words by themselves would more naturally relate to the trial carried on before the District Judge—he is going to investigate the facts, see the witnesses and so on. Further, if it had been intended that the words in s. 20 should include a right of appeal to the Supreme Court something would have been said about the decision of the Supreme Court in s. 21 ; it would not have been confined to laying down what was to be done after the judgment was given by the Commissioner or the District Judge. That omission is significant. For the above reasons the right view is that s. 20 does not include a right of appeal to the Supreme Court. In the ordinary language of lawyer or layman " trial " is not the word that would be used in talking about an appeal. It is also submitted that " trial " does not include " judgment, "

(1) (1936) L. R. 63 I. A. 180, (2) (1916) L. R. 43 I. A. 192, 197.
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but what goes before judgment. [Reference was made to various sections of the Civil Procedure Code to show that "trial" is not used of proceedings in the Court of Appeal.] It has been definitely said more than once that there must be express words to give a right of appeal; that has been greatly stressed in the English cases; implied provision is not enough: *Rex v. Hanson* (1); *Reg. v. Stock* (2). It is submitted, therefore, that as a matter of construction the words at the end of s. 20 do not include an appeal; that if the matter is left in doubt then the appeal fails for lack of express provision.

The appellant contends alternatively that he has a right of appeal by virtue of s. 73 of the Courts Ordinance, but unless he can establish that in the order made by the District Judge under s. 20 he has a judgment pronounced by a District Court he cannot get anywhere under s. 73. The order of the District Judge under s. 20 is not a judgment of a District Court; he acted by virtue of the provisions of the Waste Lands Ordinance, and various things can be done which, it is submitted, show that the District Judge was not acting in his ordinary capacity under the Courts Ordinance, but as a *persona designata* in a special capacity. [Reference was made to *Hem Singh v. Das* (3); *Secretary of State for India v. Chelikani Rama Rao* (4); *Soertsz v. Colombo Municipal Council* (5); *Sangarapillai v. Chairman, Municipal Council, Colombo* (6), and *Kanagasunderam v. Podihamine* (7).] It is submitted that the three last cited cases, in which it was held that there was no right of appeal to the Supreme Court of Ceylon, are right.

S. E. Pocock followed, and referred, on the necessity for express words to give a right of appeal, to *Attorney-General v. Sillem and Others* (8).

Rewcastle K.C. replied. As to the suggestion that "investigation and trial" refer to the court of first instance, how can s. 18, which deals with appeal, be applicable to the determination and trial in the court of first instance, and the words in s. 20 are "foregoing provisions."

March 13. The judgment of their Lordships was delivered by LORD DU PARCQ, who stated the facts set out above and continued: The question now in issue ultimately depends on the

(1) (1821) 4 B. & Ald. 519.

(2) (1838) 8 Ad. & E. 405, 410.

(3) L. R. 63 I. A. 180.

(4) L. R. 43 I. A. 192.

(5) (1930) 32 C. N. L. R. 62.

(6) (1930) 32 C. N. L. R. 92.

(7) (1940) 42 C. N. L. R. 102.

(8) (1864) 10 H. L. C. 704, 743.

construction of the words " the investigation and trial thereof " in s. 20. The provisions of s. 18, which give a right of appeal to a person who has lodged a petition within thirty days from the date of the order of a Commissioner or District Judge, are among " the foregoing provisions " of the Ordinance. If the words " investigation and trial " are to be read as including the decision which is the end and object of the trial, it must follow that the decision, to which the provisions of s. 18 are thus made applicable, is rendered appealable. In their Lordships' opinion the word " trial " in this context must be read as including the decision, which it is not improper to regard as an important part of the trial, and the expression " investigation and trial " is to be understood as descriptive of the whole proceedings. It is true that in some contexts (e.g., in the Code of Civil Procedure) the word " trial " is at times used in contradistinction to " judgment " or " appeal," but there is nothing in the material sections of the Waste Lands Ordinance which suggests that the word is there being used with this limited meaning. On the contrary, the intention of the legislature, so far as it can be gathered from the terms of the Ordinance, seems to have been to put a person who, though his claim was made out of time, could show " good " and sufficient reason " for his delay, in the same position as one who had lodged his petition within the time limited by s. 18. It was submitted by counsel for the respondents that it was reasonable to attribute to the legislature an intention to grant only a qualified indulgence to those persons whose claims were made at a late date, and that the right of appeal had been withheld from them deliberately. As to this submission their Lordships would observe, first, that if it had been the intention of the legislature to penalize those whose claims were made at a late date, it is difficult to believe that the draftsman of the Ordinance would not have expressed that intention in plain words, and, secondly, that, inasmuch as a claimant whose delay is due to some " good and sufficient " reason " is no less meritorious than one who has been able to act promptly, there is no ground for imputing the suggested intention to the legislature.

For these reasons their Lordships are of opinion that the learned judges of the Supreme Court were wrong in holding that the words " investigation and trial " had " a limiting " effect," and referred only to the inquiry before the Commissioner or District Judge in the narrower sense of that word.

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It was submitted by counsel for the appellants that, even if there were no right of appeal under s. 20 of the Waste Lands Ordinance, an appeal was competent by reason of the provisions of s. 73 of the Courts Ordinance. In consequence of the view which their Lordships have formed as to the construction of the former section it is unnecessary that they should express any opinion with regard to this submission, and they refrain from doing so.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the case should be remitted to the Supreme Court with a direction that an appeal lies to that court under s. 20 of Ordinance No. 1 of 1897 from the order of the District Judge dated October 30, 1941. Their Lordships have designedly abstained from expressing any opinion as to any of the other questions raised by the appeal, which it will be for the Supreme Court to determine. The respondent should pay the appellants' costs of this appeal, and also their costs of the hearing before the Supreme Court which has proved abortive. It will be for the Supreme Court to make such order as it may think right both as to the costs of the proceedings before the District Judge and as to any of the costs hitherto incurred in respect of the appeal to the Supreme Court which have not been thrown away.

Solicitors for appellants : *Lee & Pembertons.*

Solicitors for respondent : *Burchells.*

H. L. (E.)* LONDON AND NORTH EASTERN RAIL-
WAY COMPANY APPELLANTS ;
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Nov. 30. BERRIMAN AND
1946 RESPONDENT.
(HOUSE OF LORDS.)

Jan. 21.

Railway—Statutory duty—Fatal accident—Man at work on railway—Absence of look-out—"Permanent way men"—"Relaying or repairing the permanent way"—Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 1, sub-s. 1 ; sch. No. 12—Prevention of Accidents Rules, 1902 (St. R. & O. 1902, No. 616), r. 9.

The Railway Employment (Prevention of Accidents) Act, 1900, s. 1, sub-s. 1, authorized the making of rules with the object of

* *Present* : LORD JOWITT L.C., LORD MACMILLAN, LORD WRIGHT, LORD PORTER and LORD SIMONDS.

reducing the danger incidental to railway service with respect to the subjects specified in the schedule, which included "Protection " to permanent way men when relaying or repairing permanent " way." By the Prevention of Accidents Rules, 1902, r. 9, provision was made that " with the object of protecting men " working singly or in gangs on or near lines of railway " for the purpose of relaying or repairing the permanent way," railway companies were to provide persons or apparatus for maintaining a good look-out or giving warning against a train or engine approaching.

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The respondent's husband was employed by the appellant railway company, as a signal fitter's labourer, working in a group of four persons, whose duty was to look after the apparatus connecting signal boxes with signals and points in a particular area. His work included, when no specific defect was reported, the routine oiling of the apparatus. He was run over and killed by a train while engaged on this routine work. No look-out had been provided by the appellants, nor was it the practice to provide one for men doing routine oiling. The respondent brought an action against the appellants, for damages under the Fatal Accidents Acts, 1846 to 1908, alleging that the deceased was killed in consequence of their failure to provide a look-out, in breach of r. 9 of the Prevention of Accidents Rules, 1902 :—

Held (per Lord Macmillan, Lord Porter and Lord Simonds, Lord Jowitt L.C. and Lord Wright dissenting) that the appellants were not in breach of r. 9, since at the time of his death the deceased was not engaged in " relaying or repairing the permanent " way," as the operation he was performing did not amount to " relaying or repairing."

Quaere. Whether the mechanism embedded in the ground close to or between the running lines and operating to deflect the points is part of the permanent way.

Decision of the Court of Appeal (sub nom. *Berriman v. London and North Eastern Ry. Co.*) [1945] K. B. 462, reversed. 

APPEAL from the Court of Appeal.

The facts, summarized from the opinions of their Lordships were as follows: On December 27, 1943, Frederick John Berriman, a signal fitter's labourer in the employment of the appellants, was knocked down by one of their trains and killed, whilst working in the course of his employment. His widow, the respondent, brought an action against the appellants, claiming damages on the ground (inter alia) that his death was due to the failure of the appellants to observe r. 9 of the Prevention of Accidents Rules, 1902. On the day in question it was the duty of Berriman, in conjunction with another employee named Rowe to do what was described in the evidence as " routine cleaning and oiling " of the mechanism connecting the signal cabin and the points or the

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signals on the running lines at West Parade Junction, Hull. This operation, which was essential to the proper working of the system, was performed about once a week. At the time of the accident the men were oiling and possibly also cleaning this mechanism, the task being one which was done by two men working together, as in this case, one holding an oil feeder and the other a brush and a tin of oil, so that he could dip the brush and rub it on the mechanism. Accordingly, they took these implements with them and no others. There was no evidence that Berriman was attending to any mechanism which had broken down or proved faulty and he had left behind in the signal cabin the tool-bag which he was accustomed to take with him in such cases. On the slate kept at the signal cabin for the purpose, there was no record of any faults having been reported.

A considerable number of trains were passing on the lines where the men were working and their task took them alongside or inside the track, but it was not the practice of the appellants to provide any person or apparatus to maintain a look-out or warn the men doing the oiling against any train or engine approaching them, although, when a job of repair, which might take some time, had to be done, a look-out man was asked for and provided. At about 1.38 p.m. the signalman in his cabin saw the men, Rowe bending down, and Berriman standing up, and they appeared to be at work. Soon afterwards they were run down by the passenger train which had left Brough at 1.20 p.m. and was due at Hull at 1.43 p.m. The driver, as he was approaching the signal cabin, saw the two men, who appeared to be just getting up from a stooping position, but it was then too late to avoid striking them. No one else witnessed the accident. One body was found in the four-foot way between the rails and the other between that line of rails and the next. The men worked, in the organization of the appellants' staff in a gang of four persons, who had a considerable area in their charge, and whose duty it was to repair, keep in order and oil the signals and their equipment and the mechanism operating the points. This mechanism was operated as follows: The signalman in his cabin was able, by pulling a lever, to move signals and to deflect points. The pulling of the lever deflected the points by means of a series of iron rods, cranks and pulleys. The rods normally ran alongside the lines of rails, possibly for some distance, either outside or inside the track, till they came

opposite the place where the points were. The points were tapering rails sharpened to a point and capable of being moved backwards and forwards, up to and away from the rails, so as to switch or guide a train from one line of track to another. In order to effect this the motion communicated to the rod from the signal-box was changed from a motion alongside the rails to a motion at right angles to them. The point was held and moved in a sort of shoe called a slide chair. There were considerable lengths of straight rods and in addition to the cranks and pulleys there was a mechanism, called a detector box, which acted as an interlocking apparatus between the signals and the points. For the purpose of moving the points to and fro, the rods were bolted to the point rails. When they were diverted from their course alongside the rails, the rods operating the points were carried on timber blocks, embedded in the ground, across the lines of rails. The rods were supported by fastenings let into the track or on rollers bedded on the sleepers.

The appellants' staff was divided, for administrative purposes, into groups performing different functions and two of these consisted of the signal fitters, to which Berriman belonged, on the one hand, and the "permanent way men" on the other hand. While the duty of the former was to deal with the signals themselves and their equipment and also with the mechanism which worked the points, the duty of the latter was concerned solely with the track itself and the rails. As regarded the points mechanism the sphere of one group ended and of the other began at the spot where the rods were bolted on to the point rails. Thus, the functions of the signal fitters covered the oiling and cleaning of the rods from the signal cabin to the slide chair, including the slide of the point rod, whereas the slide of the point itself came under the care of the permanent way men. At the trial before Stable J., Benjamin Marshall, a ganger on the plate-laying side of the appellants' organization and Mrs. Helen Green, a signal fitters' labourer attached to the same gang as Berriman, witnesses called by the respondent, gave evidence as to these separate functions. Evidence to the same effect was given by John Thompson, described as "engineer at "York of the London and North Eastern Railway" and "in charge of the civil engineering work of the railway "company in the north-eastern area" and by William Wallace, chief civil engineer of the London Midland and

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H. L. (E.) Scottish Railway, both called as witnesses on behalf of the appellants.

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In examination-in-chief Thompson was asked : " Does the expression ' permanent way ' have some definite meaning to railway men ? " Counsel for the respondent objected to the question but Stable J. allowed it and the witness replied : " Beginning from the foundation, so to speak, it consists of ballast, sleepers, the chairs which carry the rails and the rails themselves, and the fastenings which fasten the rails to the sleepers and the rails to the chairs, and also the switches and crossings which form the junctions—which are special forms of rails and chairs—and they include these slide chairs that have been mentioned in this case, the slide chair on which the point rail slides." In cross-examination he was asked several questions in relation to the connecting rods and other apparatus by which the point system was worked from the signal box with a view to obtaining an admission that they were part of the permanent way but this he denied. The following were among the questions : " Q. Is not your distinction between where the permanent way begins and where it ends very artificial ? A. No, it is a very clear cut distinction, so clear that some railways make two departments divide at that point Q. Where does the permanent way end on either side ? A. The broad answer is that it ends where the ballast ends, which is sloped down to the natural earth at the sleeper's end."

Similar evidence was given by Wallace, who was asked the following questions in cross-examination : " Q. I would like you to tell my Lord what is your definition of ' permanent way ' ? A. Well, the permanent way is the final track laid down at the opening of the line and then subsequently renewed, as compared with the overland route of the contractors at its construction. . . . Q. If it includes points, and points are included in the permanent way, is not the mechanism which moves the points included in permanent way ? A. No. Q. If points are included in the permanent way, why do you say that the mechanism which gives life or usefulness to them is not included in the permanent way ? A. Because they are part of the signalling. The actuation of the points is part of the signalling Q. Do you agree that if that point were to be moved by a hand lever at the side that would be part of the permanent way ? A. Yes, the permanent way man deals with all hand points.

"Q. It becomes permanent way when it is a hand one, "because it happens to be handled by a permanent way man?"
 "A. No Q. What then? A. Because there is no "signalling at the place" In re-examination he was asked: "Q. Do you find these hand-operated points on an "ordinary running line? A. No. Q. Where do you find "them? A. Only in yards, in sidings and engine sheds or "goods yards or something of that. You are not allowed to "have hand points on passenger roads."

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Stable J. held that Berriman was not negligent but dismissed the action on the ground that he was not "relaying" or repairing the permanent way." He said that if a defect in the functioning of the mechanism was due to the fact that a certain amount of oil was required the operation of providing it might properly fall into the category of repair but in this case there was no evidence that anything was not functioning properly. The Court of Appeal reversed this decision, holding that Berriman was working at a place which was part of the permanent way and that the work of oiling and cleaning was "repairing" within the meaning of r. 9 of the Rules of 1902. The appellants appealed to the House of Lords.

Sir Walter Monckton K.C., Beney K.C. and Felix Denny for the appellants. The deceased was not working on repair of the permanent way, since, though the points themselves are part of the permanent way, the mechanism which operates them is not. The permanent way does not include its concomitants, for there is a clear distinction between the way necessary to carry the traffic—the rails, points, sleepers and ballast—and the appliances which are necessary for its efficient working but are not part of the way itself. The distinction is reflected in the different functions of a railway company in (a) maintaining the permanent way, and (b) guiding the trains where they should go. Accordingly the "permanent way men" are a class well defined according to function and organization and the employment of the deceased did not bring him within that class. A man in a totally different category is not a "permanent way man" just because he goes on to the permanent way, e.g., a shunter. Such a man does not become a "permanent way man" even if he is concerned with the state of the way, e.g., if he is an inspector or a solicitor investigating a subsidence. The expression "permanent way men" should be understood

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according to its well defined meaning in railway parlance. It must be taken as incorporated by implication in the Act of 1900 and the rules made under it. Accordingly, such a man as the deceased, who attended to the mechanism of switching the points, is not a permanent way man and is not within the category of workmen whom the Act and r. 9 of the rules were designed to protect. [They referred to *Vincent v. Southern Ry. Co.* (1) and to pp. 111, 117 and 246 of the House of Lords Record in that case and Reasons 2 and 3 at p. 9 of the respondents' case therein.] Even if the expression "permanent way" be given a meaning wider than that for which the appellants contend, the phrase relaying or repairing "the permanent way" cannot include oiling this mechanism in a routine way and not because anything was wrong. It is significant that "relaying" is put with "repairing." To repair is defined in the Oxford English Dictionary as "to restore . . . to a good condition by renewal or displacement of damaged parts or by refixing what has given way" and reference is made to Milton's *Paradise Lost*: "Disburd'nd Heav'n rejoic'd and soon repaired her mural breach." It is of the essence of repair that there must be something to put right and in this case there was no actual fault which the men were putting right. In any event, not all steps for putting something right go as far as repair. Routine cleaning and oiling is prevention rather than cure, not repair but maintenance, in ordinary parlance. The word "maintenance" is not used in the Act: see *Wood v. Walsh & Sons* (2); *Hoddinott v. Newton, Chambers & Co., Ltd.* (3); and *Dredge v. Conway, Jones & Co.* (4). If routine oiling were a job which required that the man engaged on it should be accompanied by a lookout man that would impose a very heavy burden on railway companies. This is not a case like *Hutchinson v. London and North Eastern Ry. Co.* (5). Further, when an expression used in a statute is ambiguous, the House will not readily interpret it in a sense which would involve the application of a penal provision: see *Remington v. Larchin* (6).

Beney K.C. following. The expressions "permanent way" "men" and "permanent way" in the Act and Rules should be interpreted according to their particular meaning in railway parlance; see *Unwin v. Hanson* (7). Their meaning as technical

(1) [1927] A. C. 430.

(2) [1899] 1 Q. B. 1009.

(3) [1901] A. C. 49.

(4) [1901] 2 K. B. 42.

(5) [1942] 1 K. B. 481.

(6) [1921] 3 K. B. 404.

(7) [1891] 2 Q. B. 115, 119.

railway terms has been stated in the evidence. Though ordinary members of the public might give them several different meanings, the court should be guided by the meaning attributed to them by railway men. As to the meaning of the word "repairing," this is not a synonym for "maintaining," which was neither used nor intended in the Act. "Relaying" must be read with "repairing." The meaning of the former shades off into the latter. This was new legislation, no previous statute having dealt with this particular subject matter. It was only intended to cover a limited class of persons carrying out a limited class of duty. It is significant that throughout the period which has elapsed since the Rules came into force, it has never been the practice to have a look-out man when the oiling was done.

Fox Andrews K.C. and *J. Charlesworth* for the respondent. When the protection of life or health is in view a penal statute will be widely construed. In this case, the death of Berriman was the result of the appellants' failure to perform their duty, under r. 9 of the Rules of 1902, to provide a person to keep a good look-out or give warning of the approach of any train. He was a "permanent way man" and was repairing the "permanent way" when he was killed. The first question to be considered is: What is the meaning of the expression "permanent way" in the statute? The definitions suggested by the witnesses for the appellants are too narrow and rigid. They would apparently exclude troughs between the lines or the live rails on an electric railway. Though the repair and maintenance of the signalling mechanism and of the track and the rails are kept separate for the purposes of railway administration and convenience, there is not any real distinction between the two affecting the true meaning of "permanent way" in the Act. Moreover, the witnesses could only speak as to the practice in their respective railway companies, which were established in 1923, several years after the passing of the Act. The expression must be interpreted in the light of the object of the Act. The appellants' distinction is artificial because it would have the result that if two men were working side by side, one doing something to the rails and the other oiling the signal apparatus and both were killed by the same train, the widow of the former could recover damages but not the widow of the latter. The "permanent way" must include the rods and connexions which work the points and signals. By analogy, the rubber strip in a roadway

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controlling the traffic lights is part of the highway. The next question, which depends on the first, is : What is a " permanent way man " ? A man whose task involves attention to the permanent way itself or manual work on it is a permanent way man. One who is employed in doing anything which makes the rails safe for the use of traffic must be a permanent way man : see the judgment of MacKinnon L.J. in the Court of Appeal (1). Thus every man oiling part of the permanent way is a permanent way man. Admittedly the men who oil the point slides are permanent way men. It would be extraordinary if the men oiling the point rods alongside were not. Again, the mechanism of the hand operated points is admittedly in charge of the permanent way men. It would be strange if the men who deal with the rods of the mechanically operated points were outside that category. The men oiling this mechanism require protection just as much as do platelayers. The final question is : Was Berriman engaged in " repairing " the permanent way within the meaning of r. 9 ? Repairing means not only putting something right but also getting something ready, maintaining it, keeping it right, preventing it from going wrong. The prefix " re- " does not necessarily denote putting something back again. The Oxford English Dictionary says that it may be " prefixed to verbs . . . which denote fitting, furnishing, " supplying or treating with something." One of the definitions of " repair " is " to furnish or provide with something," and the example is given from the will of J. Bowler (1557) : " My wif shall kepe maynteyn and repayer all my " said children with meate drincke and honnest apparrell." Further, Dr. Johnson said : " A man, sir, should keep his " friendship in constant repair." In that sense " repair " means keeping something in working order. Again, to put rubbers on a pair of boots to keep out the water amounts to repair. The general scope and purpose of the Act indicates that a wide meaning should be given to the word : see *Greg v. Planque* (2) and *Leek Improvement Commissioners v. Staffordshire Justices*. (3)

J. Charlesworth following. Since r. 9 of the Rules of 1902 is not ultra vires it is not permissible to look back to the Act of 1900 under which the rules were made in order to narrow its meaning. The matters set out in the schedule to the

(1) [1945] K. B. 462, 469.

(3) (1888) 20 Q. B. D. 794, 797.

(2) [1936] 1 K. B. 669, 673, 677.

Act are only headings or topics and are not exhaustive. That "permanent way" includes more than the evidence for the appellants suggested is indicated by the Notice of Accidents Order, 1906 (St. R. & O. 1906, No. 947), in the use of the expression in paras. 2 and 3 and of the expression "buffer stops" in para. 3 (o). Evidence as to the meaning of an ordinary English word in a modern statute of general application is not admissible: *Camden (Marquis) v. Inland Revenue Commissioners* (1).

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Sir Walter Monckton K.C. in reply. *Camden (Marquis) v. Inland Revenue Commissioners* (1) is no authority as to the evidence admissible in indicating the meaning of an expression not commonly understood, like "permanent way." As to the meaning of the word "repair," the definition in the Oxford English Dictionary most helpful to the respondents is there marked as obsolete. Its meaning is properly set forth in *Inglis v. Buttery* (2). The expression "relaying or repairing" is not the same as maintaining and cannot include oiling and cleaning. If machinery is sufficiently oiled it prevents any incipient state of disrepair and accordingly repair cannot include routine oiling which is an application of oil to a part not defective.

THE HOUSE took time for consideration.

Jan. 21, 1946. LORD JOWITT L.C. My Lords, on December 27, 1943, Frederick John Berriman, deceased, who was then a labourer in the employment of the appellant company, was knocked down by a train and killed whilst working in the course of his employment. His widow, the respondent, brings this action alleging that his death was due to the failure of the railway company to observe r. 9 of the Prevention of Accidents Rules, 1902. The Railway Employment (Prevention of Accidents) Act, 1900, provides by s. 1, sub-s. 1, as follows:—"The Board of Trade may, subject to "the provisions of this Act, make such rules as they think fit "with respect to any of the subjects mentioned in the schedule "to this Act, with the object of reducing or removing the "dangers and risks incidental to railway service." No. 12 of the schedule is in the following terms:—"Protection to "permanent way men when relaying or repairing permanent

(1) [1914] 1 K. B. 641.

(2) (1878) 3 App. Cas. 552, 573, 574.

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"way." Pursuant to the powers contained in the Act, rules were made in 1902 and the material words of r. 9 are as follows :—" With the object of protecting men working singly " or in gangs on or near lines of railway in use for traffic for " the purpose of relaying or repairing the permanent way of " such lines, the railway companies shall, after the coming into " operation of these rules, in all cases where any danger is " likely to arise, provide persons or apparatus for the purpose " of maintaining a good look-out or for giving warning against " any train or engine approaching such men so working." On the day in question the deceased man Berriman, in conjunction with another employee named Rowe, was engaged in cleaning and oiling a certain apparatus between or near to the running lines. There were a considerable number of trains passing upon these lines. The engine driver of the train leaving Brough at 1.20 p.m. on its way to Hull when approaching the West Parade Junction signal cabin saw two men who appeared to be just getting up from a stooping position. They were knocked down and killed by the on-coming train : they were Berriman and his mate Rowe. It was admitted that no protection had been given to these men by means either of persons or apparatus whilst they were doing their work : and it was not contested that they were working at a place where danger was likely to arise. The work which they were doing was connected with the signalling apparatus. The signalman in his box is able by pulling a lever to move signals and to deflect points so as to transfer a train from one running line to another. The mechanism which ensures, for example, that the result of pulling a lever in the signal box is that points are deflected, consists of a series of rods, cranks and levers. Some part of this mechanism is embedded in the ground actually between the running lines and other parts are so close to these lines as to cause men working thereon to be in danger from passing trains in the absence of a proper look out.

The question that arises is whether there was or was not a duty on the part of the railway company to give protection to these men by means of persons or apparatus, for if so there is no question but that the duty was neglected. Upon these facts as it appears to me the following three questions arise :— 1. What is the meaning of the words " permanent way " in the Act of 1900 ? 2. Was the deceased workman a " permanent " way man " within the meaning of that Act ? 3. Was he at the material time engaged in repairing the permanent way ?

I proceed to consider these three points in order, and first as to the meaning of the phrase "permanent way." It is, I think, legitimate in construing a statute relating to a particular industry to give to the words used a special technical meaning if it can be established that at the date of the passing of the statute such special meaning was well understood and accepted by those conversant with the industry. In the present case in the endeavour to prove that the words "permanent way" had at the date of the passing of the Act acquired a special or technical meaning the appellants, in the court below, called a Mr. Thompson, the engineer of the appellant company in charge of their engineering work in the North Eastern Area, and a Mr. Wallace, the Chief Civil Engineer of the London, Midland and Scottish Railway Co. Even if we disregard the fact that these railway companies were not established until many years after the year 1900 it seems to me that the evidence called completely failed to establish that the words "permanent way" had at any time acquired any special technical meaning. Mr. Wallace was asked to give his definition of the words and his answer was as follows:—"The permanent way is the final track laid down at the opening of the line and then subsequently renewed, as compared with the overland route of the contractors at its construction." Mr. Thompson gave the same answer and when asked where the permanent way ended on either side replied:—"The broad answer is that it ends where the ballast ends, which is sloped down to the natural earth at the sleepers end." The most that the evidence of these two witnesses established was that for the purposes of the internal organization of the engineering work of their companies the work which had to do with signals and signalling apparatus was kept separate and distinct from the work which was concerned with the track. It seems to me quite illegitimate to spell out from this eminently practical division of work any definition of the words "permanent way" and indeed the attempt to do so leads to ridiculous conclusions. Thus the points which deflect a train from one running line to another are admittedly part of the permanent way, whilst the mechanism which pulls the points over—even although fastened in the ground between the lines on which the train runs—is said not to be part of the permanent way. A hand-operated lever, such as is frequently to be seen in shunting yards, is said to be part of the permanent way even although it is placed completely outside the extremities of the sleepers

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simply because it is not connected with the signalling system. I asked—and I asked in vain—during the course of the argument whether the water trough, which is placed between the running lines to enable an engine to pick up water whilst in motion, was or was not part of the “permanent way”? My Lords, I confess that I can get no assistance in construing the words “permanent way” from this evidence and without attempting any definition of my own I am clearly of the opinion that a man working on a piece of mechanism embedded in the ground either between the running lines or so near to the running lines that he would be knocked down by a passing train is working on the permanent way. I confess that I am relieved to be able to come to this conclusion, for were it otherwise no man working on such a piece of mechanism, no matter how exacting or absorbing his work might be and no matter that it was undoubtedly a work of repair, would be within the protection of the statute. I find it difficult to believe that the legislature in passing the Act of 1900 can have intended any such result. For these reasons I agree with the Court of Appeal that the deceased man was at the time of the accident working on the permanent way. Having reached this conclusion, it seems to me to follow that a workman whose regular and habitual duty was to attend to mechanism which I have decided forms part of the permanent way is a “permanent way man.”

There remains the third and to my mind the only difficult question, namely, whether at the relevant time the deceased workman was engaged in repairing the permanent way. There is no evidence to show that on the day in question he was attending to any mechanism which had broken down or proved faulty. He had indeed left behind him the tool box which he was accustomed to take with him in such cases. His work was described in the evidence as “routine oiling and cleaning”; for this purpose he and his fellow workman would take with them a feeder, a tin of oil and a brush. The evidence further established that this oiling and cleaning required to be done about once a week and that it was essential for the proper working of the system. It is, I should suppose, impossible to lay down with any precision the periods of time within which this work of oiling and cleaning must be undertaken; much must depend upon the circumstances; but it seems clear that moving parts of the gear exposed to the weather would tend to get rusted and to attract dust and debris. If they were

left unattended to they would gradually begin to work stiffly and at last would work so stiffly that they would be regarded as out of order and would be noted as a subject for repair. The Court of Appeal took the view that "repairing" as used in the Railway Employment (Prevention of Accidents) Act, 1900, must be construed as including the work of maintaining in good working order; I agree with them and I agree with them largely because I can find no satisfactory criterion to tell me at what point that which is called repair as opposed to maintenance begins. It would, I suppose, be conceded that if a nut had worked loose and required to be tightened the work involved would be a work of "repair," even although the actual work occupied only a few seconds of time. Oiling and cleaning may take longer than tightening a nut and in the course of oiling and cleaning something which is "repair" in any sense of the word may be discovered. It might, for instance, be seen that a split pin which had sheered off required to be replaced. To limit the word "repair" in the sense contended for by the appellants seems to me to make the duty imposed by the statute quite impracticable. At one moment of time a man might merely be oiling and cleaning and at another moment he might be doing something which is repair in the narrow sense of the word—that is in making good something which has developed a fault. It would be impracticable for the railway company whenever he did repair work in this sense to afford him protection which they failed to give him in the course of his oiling and cleaning.

There is a further consideration which leads me to agree with the decisions of the Court of Appeal. I have already reminded your Lordships of the evidence that this oiling and cleaning was necessary about every week. Supposing it was neglected—what would happen? The mechanism would begin sooner or later to work stiffly, but the signalman would still be able to pull over his lever without much difficulty. After a short while he would notice that it was working very stiffly and in time it would not work at all. Then I presume, it would be conceded that it was a case calling for "repair"; but it would seem that the question is essentially one of degree, and that it is impossible to fix any definite point at which "maintenance" ends and "repair" begins. The word "repairing" is in my view a word sufficiently wide, if the context so requires, to include "maintaining." Having regard to the fact that the primary intendment of the Act

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in question was to provide more adequate protection for railway servants, I think it should be so construed in this case. Accordingly, in my view a man engaged in oiling and cleaning the moving parts of the machinery which enables the signalman to adjust the points is engaged in the work of repair. I find some support for this conclusion from the case of *Greg v. Planque* (1) with which decision I agree. For these reasons I would dismiss the appeal.

LORD MACMILLAN. My Lords, on December 27, 1943, Frederick John Berriman, a signal fitter's labourer in the employment of the appellants, the London and North Eastern Railway Co., was run down and killed by one of the appellants' trains when, in the course of his employment, he was engaged in oiling and cleaning the connecting rods which actuate points on the lines at West Parade Junction, Hull. In the present action by the respondent, his widow, against the appellant company, she claims damages on the ground inter alia that the death of her husband was attributable to a breach by the appellant company of r. 9 of the Prevention of Accident Rules, 1902, made by the Board of Trade pursuant to s. 1, sub-s. 1, of the Railway Employment (Prevention of Accidents) Act, 1900. By that statute the Board of Trade were empowered, "with the object of reducing or removing the " dangers and risks incidental to railway service," to make such rules as they thought fit with respect to twelve subjects mentioned in the schedule to the Act. Of these subjects the twelfth is " Protection to permanent way men when relaying " or repairing permanent way." Of the rules so made r. 9 relates to this subject and reads as follows:—" With the " object of protecting men working singly or in gangs on or " near lines of railway in use for traffic for the purpose of " relaying or repairing the permanent way of such lines, the " railway companies shall, after the coming into operation " of these rules, in all cases where any danger is likely to arise, " provide persons or apparatus for the purpose of maintaining " a good look-out or for giving warning against any train or " engine approaching such men so working, and the persons " employed for such purpose shall be expressly instructed to " act for such purpose, and shall be provided with all appliances " necessary to give effect to such look-out." If this rule applied to the deceased and to the work on which he was

(1) [1936] 1 K. B. 669.

engaged when he met his death, it is admitted that it was not observed for no person or apparatus was provided by the appellant company for the purpose of maintaining a good look-out or for giving him warning against any train or engine approaching him while at his work. There is no question that the deceased was working on or near lines of railway in use for traffic or that the case was one in which danger was likely to arise. But the rule requires for its application more than this. It is only where men are working on or near traffic lines "for the purpose of relaying or repairing the permanent way of such lines" that the protection of a look-out must be provided.

The appellant company, in contesting the application of the rule to the case of the deceased, submitted that the deceased was not a "permanent way man" within the meaning of head 12 of the schedule to the statute of 1900, and was therefore not within the category of workmen whom the rule was, under the statute, designed to protect. They further submitted that the deceased was in any event not engaged in any work of relaying or repairing and that if he was engaged in repairing it was not the permanent way that he was repairing. These contentions prevailed with Stable J. who heard the case in the first instance, but they were rejected by the Court of Appeal. The actual job on which the deceased was engaged was that of oiling and cleaning the system of rods actuating points on the running lines. The points are tapering movable rails which enable vehicles to be switched or guided from one line of track to another. They are operated from the signal box with which they are connected by a system of movable rods. It is obvious that for the safe and efficient working of the points and connecting rods their movable parts must be kept oiled and cleaned, and in good repair. There was much argument as to whether what I may call this switching apparatus formed any part of the permanent way and whether the men whose duty it was to attend to it were permanent way men. It was said that the expression "permanent way" was a term of art in railway parlance and evidence was adduced by the appellant company to the effect that in the vernacular of railway men the permanent way comprises only the ballast and sleepers, chairs, rails and fastenings of which the track is composed, while the apparatus for working the signals and points with which the system is equipped is never referred to as part of the permanent way, except in the case of points

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operated by hand levers and unconnected with any signals. This distinction, it appears, is reflected in the organization of railway administration in which the departments concerned respectively with the permanent way and with signals and points are clearly differentiated and separately staffed. I recognize that when Parliament employs technical terms without definition in a statute dealing with a particular art or industry courts of law are entitled to have the assistance of skilled persons in the interpretation of such terms and indeed the present statute and rules contain numerous technical terms as to whose meaning in railway parlance evidence would be almost indispensable. But assuming that evidence was admissible as to the meaning of "permanent way" I am not satisfied, on the evidence adduced in this case, which was largely based on administrative practice and convenience, that the expression "permanent way" as used in the statute and rule ought to be read in the limited sense for which the appellant company contended. The movable tapering rails which form the points are as much part of the running track as the immovable rails and the apparatus of rods attached to these movable rails for the purpose of actuating them is a necessary part of the equipment of the running track. The relaying or repairing of this apparatus is an operation attended with the same danger as the relaying or repairing of the rails themselves and, having regard to the purpose of the statute and rule, I can see no adequate reason for providing protection in the one case and not in the other.

I do not, however, find it necessary to pronounce finally on this matter for in my opinion, even if the system of connecting rods forms part of the permanent way, the deceased was not engaged in relaying or repairing these rods. He was oiling and cleaning them. There is of course no question that he was not doing any work of relaying the permanent way. The critical word for the present purpose is "repairing." I am unable having regard to the ordinary usage of the English language, to characterize the work of oiling and cleaning as a work of repair. The collocation of the words "relaying or "repairing" is significant. Relaying is the major operation of renewing what is so defective as to be past repair; repairing is the minor operation of making good remediable defects. There was nothing wrong with the points which the deceased was oiling and cleaning, nothing requiring repair. The engineer who oils his engines would certainly be surprised to be told

that he was repairing them. Oiling and cleaning, to my mind, are operations designed to keep plant in good running order and to prevent the development of defects necessitating repair. There may well have been a good reason for limiting the requirement of protection to the case of men engaged in the work of relaying and repairing, for these operations suggest tasks occupying time and requiring concentration of attention, precluding those engaged in them from looking after their own safety. If the word "repairing" were to be extended to include the simple and routine matter of oiling and cleaning, the railway companies would require to provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning of an approaching train or engine every time one of their servants oiled a single bearing in the system of points and connecting rods and this under the sanction of prosecution and penalties. For it must be borne in mind that while the statute and rule have the beneficent purpose of providing protection for workmen, their contravention involves penal consequences under s. 11 of the Act. Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language. I quote and adopt the words of Alderson B.: "The rule of law, I take it, upon the construction of all statutes . . . is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity:" (*Attorney-General v. Lockwood* (1)). It appears from the evidence that it has not been the practice of the appellant company, although the rule in question has been in operation for over forty years, to provide a look-out man when oiling is being done. On the other hand when a job of repair has to be done on the points which may take some time, a look-out man is asked for and provided. If it is thought desirable to extend the protection of a look-out to the case of men engaged in oiling and cleaning it is for the legislature to do so, after investigation of all relevant considerations. The present rule in my opinion does not cover the case. I am accordingly in favour of allowing the appeal and restoring the judgment of Stable J.

(1) (1842) 9 M. & W. 378, 398.

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LORD WRIGHT. My Lords, the appellants, the railway company, are appealing against the judgment of the Court of Appeal, by which they have been held liable to compensate the respondent, the widow of Frederick John Berriman, in respect of the death of her late husband while working in the employment of the appellants. The issue is whether his death was caused by the breach by the appellants of r. 9 of the Prevention of Accidents Rules, 1902, made pursuant to s. 1, sub-s. 1, of the Railway Employment (Prevention of Accidents) Act, 1900. The relevant provisions of the Act and of the rule have been fully stated by the Lord Chancellor in the opinion which he has just delivered, and need not be repeated here. The respondent's claim was that the deceased man, while working on the appellants' railway for the purpose of repairing the permanent way in a position where danger was likely to arise met his death by reason of the appellants failing to provide any good look-out or warning of any train or engine approaching him and the other man working alongside him. He and his mate were in fact killed by a passing train or engine while engaged in cleaning and oiling the connexions leading from the signal cabin up to the slide chair which moves the point. It is not now suggested that the accident was caused or contributed to by any negligence on the part of the deceased men or either of them. The sole question is as to the effect of the rule in the circumstances of the case.

It is clear that what the men were cleaning and oiling when they met their death was the mechanism connecting the signal cabin and the point. The signal man in the cabin works a lever. This operates on a system of iron rods and cranks. The rods run alongside the line of rails until they come opposite the place where the point is. The point may be described as a rail sharpened to a point and capable of being moved backwards and forwards up to or away from the rail, so as to determine the direction of the train. In order to effect this, the motion communicated to the rod from the signal box is changed from a motion alongside the rails to a motion at right angles, so that it can move the point backwards or forwards. The deceased man and his mate were on the railway classification called signal fitters. They were responsible for oiling and cleaning the mechanism from the signal cabin to the slide chair, a sort of shoe which actually held and moved the point. The oiling and cleaning of that

part of the mechanism were treated as part of the duties of a separate gang distinguished in railway terminology as permanent way men. But I regard the whole mechanism as part of the permanent way. The rods operating the point were carried on blocks across the line of rails when they were diverted from their course alongside the line of rails. It is not denied that the slide chair and the point itself are parts of the permanent way. The attempt to split up a single composite mechanism into separate parts cannot be justified, according to my opinion, by anything in the nature of the system but can only be regarded as an arbitrary distinction for the convenience of the railway working. In my judgment, the deceased men were at the time of their death working on or near lines of traffic and in doing so were in a place where danger was likely to arise. No one witnessed the accident, except the driver of the train who, in the actual circumstances, did not see the men until it was too late to avoid them. The bodies were found on or near the lines, in fact one body was found in the four-foot way between the rails and the other outside the rails in the space between the line of rails and the next line. The two men had been seen a little time before the accident bending or standing up in attitudes consistent with the work they were obviously engaged upon. The operation of cleaning and oiling the connecting mechanism was in practice done by two men working together as in this case, one holding the oil feeder and the other the brush and tin, so that he could dip and then rub with the brush. There was a considerable length of straight rod, but in addition there were various cranks and pulleys and the mechanism called the detector box which acts as an interlocking apparatus between the signals and the points. There are thus a number of different parts which the deceased men had to clean and oil. They had a considerable area under their charge and the system was to clean and oil all the various connexions in that area once a week. The cleaning and oiling clearly were important work, necessary to secure the prompt and easy working of the mechanism between the signalman's lever and the points. Absence of friction was essential. It is said, however, that the men were not working on the permanent way because that is limited to the rails, the sleepers, the ballast and other parts necessary to carry the traffic. I think this is too narrow a view. It cannot be justified by the actual conditions of the line. I have

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already explained that the permanent way is a complex of inter-connected parts, one of which consists of the mechanism for working the points, which are themselves rails. Not only is this mechanism necessary for working the railway at all, but it is physically a part of the permanent way because it rests upon it and indeed is actually incorporated in it by means of the blocks on which it rests which are embedded in the way ; further if the rails, including the points, are part of the permanent way, as admittedly they are, so are the slide chairs which operate the points and so must be the rods which move these chairs and govern the points.

But the appellants have still a further contention. Item 12 of the schedule to the Act uses the words "permanent way men." These do not appear in the rule. It is said that "permanent way men" has a technical railway meaning, because of the classification of the employees I have quoted above, and that the rule must be read as embodying that special meaning, otherwise it would not be carrying out the schedule and would be ultra vires. There is no plea that the rule is ultra vires and in fact it has been treated as valid according to its actual terms by this House in *Vincent v. Southern Ry. Co.* (1). But in addition the argument can be disposed of by determining the meaning of permanent way men in the schedule to the Act. In my opinion, no more is meant than "men whose work has to be done on the permanent way." It would not include railway servants whose duty may take them on occasion on to the permanent way, as for instance a station-master or other official who has to pass up and down the way in the course of his employment. But it does include men like the two men who were killed, who have to do work on it, and who while there will have their attention fixed on the work they are doing, and will thus be peculiarly exposed to the danger against which the Act seeks to protect them. Thus in r. 9 it is not necessary to repeat the actual words "permanent way men" because their effect is reproduced in the rule. But there is also a broader ground for not limiting the meaning of "permanent way men" as the appellants suggest. The protection of men in the position of the deceased is the object of the measure. There is no definition in the Act of the term "permanent way men." There is no reference in the Act or rules to any practice of the railway company. What the appellants seek to do is

(1) [1927] A. C. 430.

to incorporate this practice into the schedule and rule so as to give the words a special meaning. I know of no principle of construction which would justify this course. It would be contrary to the scope and object of the Act and rule, because it would exclude from their scope men who fulfil all the conditions and would pro tanto nullify the object of the legislation which is that of reducing or removing the dangers and risks incidental to railway service. This, it is said, should be done on the basis of incorporating by implication into the Act and rule a classification or terminology adopted by the railway company for purposes of domestic convenience which has no relation to the object of the Act and indeed is contrary to it. No such implication is possible in my opinion. The actual words are capable of clear and intelligible interpretation in the sense which I have defined. It may further be noted that the Act was passed in 1900 and r. 9 was made in 1902, and there is no evidence that the legislature had any knowledge of the alleged practice, even had it existed in 1900. Accordingly, construing as I do, the words as they stand in the Act and in r. 9, I think the deceased men were within the protection of the measure.

But there still remains a further objection raised by the appellants to the respondent's claim. One condition, expressed both in the schedule and in r. 9, is that the men should be "relaying or repairing the permanent way" at the material time. Only in that event does r. 9 apply. I have sufficiently described what the men were doing. The question is whether the work of cleaning and oiling constitutes relaying or repairing or—more precisely—whether such work constitutes repairing because it is clear that the men were not relaying, that is reconstructing, the line. This has given rise to much discussion. The most important objection taken by the appellants seems to be that there was no actual fault in the mechanism (so it is said) which the men were putting right. It is said that "repair" implies an actual need of repair, that is, repair presupposes something defective which actually impedes the proper working of the system. What the men were doing, it is said, was "routine" cleaning or oiling; that, it is contended, is not repair, but maintenance and the word maintenance is not used in the Act or rule. It is also urged that in any case cleaning or oiling would not in ordinary parlance be described as repairing. The issue has certainly called for serious consideration, but I have come to a clear

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conclusion that the Court of Appeal were right in deciding as they did on this point. Morton L.J. in his careful judgment concluded (1) that "repairing" here means or includes "maintaining in good working order." He had been discussing the view of the learned judge that "repair" presupposes that something was not functioning properly; in that event the judge said he might have been prepared to concede that if the defect was simply due to the need of a certain amount of oil, the operation of oiling might be a measure of repair. Lawrence L.J. (2) similarly, applying a definition of repairing given by Avory J. in *Vincent's* case (3), was of opinion that repairing included maintenance and all the routine work which had to be done to put the line in proper working order. MacKinnon L.J. (4) adopted substantially the same view. I see no reason to dissent from that. I think the distinction which is drawn by the appellants is too narrow to be valid in construing a measure like this which is aimed at protecting men from the dangers of working on the permanent way. The danger is the same whether the men are working to remedy known and operative defects or working to get rid of a condition which if not dealt with from time to time, would eventually prevent proper functioning. The proverb "A stitch in time saves nine" imports that repair is necessary to cure an incipient defect before the stage when a tear or rent has been reached. In chalk countries pipes are cleared out before the incrustation has blocked them and so stopped the flow of water. Decarbonization of motor cars is done before the engine has ceased to be able to work. All these preliminary or precautionary measures would ordinarily be described as repair just as naturally as they would be described as maintenance. Maintenance indeed is a form of repair. It is aimed at remedying deleterious conditions which exist though they have not reached the stage of actual perceptible mischief. Metal surfaces in a machine which have to work on each other freely and without friction do suffer from an actual present defect until friction is removed by cleaning away dust or incrustation and achieving the free play by the addition of lubricants. That, I think, is fairly called repair. It has negative and positive aspects, cleaning the surfaces for which operation the

(1) [1945] K. B. 462, 474.

(2) *Ibid.* 470, 471.

(3) (1926) Unrep. See House of Lords Record, p. 247.

(4) [1945] K. B. 462, 469, 470.

brush is used, and lubricating for which the oil is necessary. When we send a watch to the watchmaker to clean, we normally speak of what is done as repair. Instances of the same kind might be multiplied indefinitely. I cannot see any difference in this context between repair and maintenance. Prevention we are told is better than cure but either process is repair. Such I think is the natural and ordinary use of words: the plain man would not, I am convinced, regard the distinction between maintenance and repair as other than unpractical and arbitrary. This is particularly true when applied to a measure like this. Its object is to protect and save human life. Least of all in such a measure can technical subtleties prevail, where the issue is between men's life and death. If it is necessary to take the specified precautions, when the work on which the man is engaged on the permanent way is renewing or replacing bolts or the like, surely it is equally necessary to impose the same safeguards when the man is cleaning and oiling. In each case, there is danger and the danger is the same. I do not mean that the Act or rule must be construed in an unnatural or forced manner. As I have said, I regard the construction adopted by the Court of Appeal as being in accordance with good sense, and everyday use of language. It is however said that as the Act imposes a penalty for a breach, it must be construed as strictly as possible in favour of the offender. There is some authority in support of this argument but none so far as I know in the case of measures like the present. Such a measure must be construed fairly, no doubt, but still, as far as is reasonable and proper, so as to achieve the declared object of the measure. Most measures of a remedial character, such as Factory Acts and a great many others, have penalty clauses, but I have never known that circumstance being regarded as a ground for a narrow and pedantic construction. What is paramount is the protection or benefit of the worker, whose right to claim damages is governed by a fair and liberal interpretation of the enactment. Still less would it be a valid argument, in my opinion, against the construction which I adopt that it would impose some additional burden on the railway company. That drawback must yield to the purpose of saving life, which must outweigh some small extra expense or trouble to the company. On the whole, the authorities favour the construction I adopt of the word "repair." The cases cited under the Workmen's Compensation Act generally deal with static constructions,

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buildings and the like, not a machine on which metal surfaces work on each other, in which the risk of friction, even short of seizing, is always serious. Decisions under a different statute are not generally precedents for the construction of another statute. I merely refer to one or two in order to show that the word "repair" is not generally interpreted in the narrow sense contended for by the appellants. In *Dredge v. Conway, Jones & Co.* (1), the Court of Appeal held that the "repair" of a building in the Workmen's Compensation Act included painting, whitewashing, cleaning, etc. The work was not merely ornamental, but was necessary for the protection and maintenance of the building. The court applied observations of Lord Macnaghten in *Hoddinott v. Newton, Chambers & Co., Ltd.* (2): "Construction, repair, demolition—these operations 'cover, I think, every varying phase in the life of a building 'from its beginning to its end.'" He had said (3): "Repair, 'as the word is commonly understood, is repair, whether 'much is done or little.'" I shall only quote one other illustration, which I find in *Greg v. Planque* (4): That was a case between landlord and tenant and among other matters raised the question whether cleaning a flue was executing repairs within the meaning of the lease. It was held that it was. I merely refer to it because of some general observations in the judgment of Scott L.J. He says "The word 'repair' 'is an ordinary English word and its natural meaning is 'wide If one's motor car is not running well and is 'sent to the works for overhaul, one would normally regard 'it as repair work, even if told that all that had to be done 'was to decarbonize the cylinders. People use ordinary 'words in rather a wide sense.'" I shall not multiply citations for what seems to me to be obvious. For myself, I would dismiss the appeal.

LORD PORTER. My Lords, the respondent's husband F. J. Berriman was a signal-fitter's labourer employed by the appellants and it is plain that at the time of his death he was engaged in an occupation which exposed him to danger. The appellants' staff was divided, it appears, at least for administrative purposes, into groups performing divergent functions and two of those groups consist of the signal fitters so called on the one part and of the permanent

(1) [1901] 2 K. B. 42, 45.

(3) Ibid. 54.

(2) [1901] A. C. 49, 55.

(4) [1936] 1 K. B. 669, 678, 679.

way men so called on the other, the duty of the former being to deal with not only the signals themselves and their equipment but also the points and the rods which work them ; rods which normally travel along the lines of rails possibly for some distance either outside or inside the track and are bolted to the rails for the purpose of moving the points to and fro. The duty of the latter is concerned solely with the track itself and the rails, the work of one group apparently ending, and the other beginning at the spot where the rods are bolted on to the point rails, with the result that the rods though supported by fastenings let into the track or held by the sleepers are counted as within the cognizance of the signal group even though they cross the track and are supported on rollers bedded upon the sleepers, whereas the slide chairs over which the points themselves move are within the competence of the so-called permanent way men and it is their task to oil them. In this organization the deceased man worked in a group of four persons whose duty it was to repair, keep in order and oil the signals and their equipment. One may perhaps describe the two sides, as little tendentiously as possible, by calling those who deal with the track and rails the plate laying side and those who like the deceased man dealt with points and signals the signal side. Their separate functions are described first of all by Mr. Benjamin Marshall who was on the plate laying side and secondly by Mrs. Green a fellow worker with Mr. Berriman on the signal side. The evidence of these witnesses undoubtedly does separate the function of the two groups to the extent that oiling the slide of the point rod is signal work whereas oiling the slide of the point itself is undertaken by the plate laying side. With these considerations in mind it is necessary to set out the relevant provisions of the statute and rules dealing with the case and the contentions of the two parties. As has been stated the deceased man was killed when engaged on his duties as a signal fitter and whilst, as I think, oiling the point rods either in or alongside the track, and his widow sues the appellants on the ground that they did not provide persons for the purposes of maintaining a good look-out or for giving warning against any train or engine approaching such a man so working. This contention depends upon the wording of the Railway Employment (Prevention of Accidents) Act, 1900, and the rules made thereunder. The Act itself is entitled "an Act for the better

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"prevention of accidents on railways" and s. 1, sub-s. 1, provides, "The Board of Trade may, subject to the provisions of this Act, make such rules as they think fit with respect to any of the subjects mentioned in the schedule to this Act, with the object of reducing or removing the dangers and risks incidental to railway service." The schedule refers to a number of topics mostly concerned with the safety of mechanical apparatus used in railway working. Amongst other matters it mentions: "(6.) Protection of point rods and signal wires, and position of ground levers working points." The only reference to the safety of men as such, as opposed to the safety of the appliances they use, is contained in No. 12, which mentions: "Protection of permanent way men when relaying or repairing permanent way." Under the powers conferred by the Act, rules were made in 1902 and reliance is placed upon r. 9 which so far as is material is in the following terms: "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working. . . ." This rule is obviously meant to deal with topic 12 of the schedule to the Act, whereas the safety of the apparatus with which the deceased man was concerned is provided for by r. 5 which runs as follows: "Where point rods and signal wires are in such a position as to be a source of danger to persons employed on a railway whilst in the execution of their duty, such point rods and signal wires must, within two years from the coming into operation of these rules, be sufficiently covered or otherwise guarded. Within the same period ground levers working points must be so placed that men when working there are clear of adjacent lines, and shall be placed in a position parallel to the adjacent lines, or in such other position and be of such form, as to cause as little obstruction as possible to persons employed on the railway whilst in the execution of their duty." The respondent says that her husband was a permanent way man, that he was repairing the permanent way when he was killed and that contrary to r. 9 the railway company did not provide any person for the purpose of maintaining a good

look-out. It is admitted that no look-out was provided and no question arises as to the likelihood of danger arising but the appellants maintain (1.) that the deceased man was not a permanent way man ; (2.) that he was not at the time of the accident relaying or repairing anything ; and (3.) that in any case he was not at that time repairing the permanent way. The respondents asserted that the proper sequence of approach to the contentions was to ask first whether Mr. Berriman was engaged in working on the permanent way, secondly whether, in the light of the answer to that question, he was a permanent way man and thirdly whether he was repairing the permanent way.

As, for reasons which I give later, I think that the dead man was not repairing the permanent way or indeed engaged on work of repair at the time of his death, the other two questions are not strictly material to this decision, but they have been fully argued and I think it desirable to express a tentative though not necessarily a final view upon them. Prima facie of course words whether in an Act of Parliament or elsewhere must be construed as bearing their natural meaning, and in the present case if unassisted by any evidence, I should take the "permanent way" to include the track, i.e. the rail and sleepers and that which supports them together with its immediate equipment such as at least signal wires and point rods and their supports ; and "permanent way men" I should take to be those whose duty it was to attend to the track so defined and the equipment referred to. The technical division adopted by the railway for the purpose of its organization I should regard as having no material bearing on this result. It is, however, true that any occupation may employ terms in a technical sense and if it be shown that they normally have a technical sense in any industry then that is the sense and the only sense which they must be considered to bear when used in reference to that industry. It is said that the evidence of the railway witnesses has established such a special meaning for the words "permanent way" and "permanent way men" in the present instance and if I thought that the effect of the evidence was to establish such a meaning in general railway parlance, I should give effect to it. But I do not think that a technical meaning has been proved. The evidence seems to me to establish no more than that railway managers have for their own purposes of management divided their staff into various categories one of which they dub

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permanent way men. They do not establish that the phrase is used in this sense throughout the railway world ; still less that that is its only general use. Similarly I cannot find that the meaning of " permanent way " is limited to that portion of the line of which they employ these words. The fact that the use of a phrase in a limited sense is convenient to the management does not prove that it bears that meaning throughout the industry and short of an allegation that the railway world throughout its various branches of management and men use the relevant words as excluding men whose duty it is to see to the signals points and their equipment I prefer to attribute to them the wider meaning which in my view they more naturally bear. " Permanent way " in my opinion includes not only the track itself but also all the equipment for guiding a train on its proper course and on to its proper track as well as the metals on which it runs and the ground or structure supporting them, and I feel great difficulty in saying that the point lines are part of the permanent way whereas the point rods which move them and are permanently fastened to them for that purpose are not. The principle and its limitation are I think well expressed by Lord Esher M.R. in *Unwin v. Hanson* (1). " If the Act is one passed with " reference to a particular trade, business, or transaction, and " words are used which everybody conversant with that trade, " business, or transaction, knows and understands to have " a particular meaning in it, then the words are to be construed " as having that particular meaning, though it may differ " from the common or ordinary meaning of the words " Now dealing with the cutting of trees in the country, is " there not a language which all people in the country con- " versant with trees know and understand ? It is not a " question of mere forestry, but of what people generally " living in the country know and understand by the use of " a particular term with respect to the cutting of trees there." The class whose understanding is to be taken into consideration includes all those conversant with the industry concerned. It is not enough for the evidence to establish that a portion only, namely, the management, limit the expression permanent way men to a particular body.

But though the deceased man may have been included amongst permanent way men, the question remains to be

(1) [1891] 2 Q. B. 115, 119.

answered, was he laying or repairing the permanent way. It appears to be established that he and his mate were, engaged in oiling or cleaning and oiling either the signal lines or the point rods. They had not taken their tools with them, and were equipped only with an oil can, a brush and a feeder. Moreover there was no record on the slate of any other work which they were required to do. In these circumstances the evidence establishes that they were engaged on routine oiling, which might include brushing the dust from the signal wires or point rods, but no more. It was no doubt established that in working they were exposed to danger, that their task took them alongside or inside the track, and it was urged that they required protection just as much as a platelayer working on the track itself. Moreover it was pointed out that according to the appellant's evidence the men who oiled the point slides were classed as permanent way men, and as such, it was said, within the mischief of the Act and rules.

My Lords, just as I think the expression permanent way men is to be used in its normal and natural meaning, so to my mind repairing the permanent way must be similarly construed. I cannot think that the ordinary man, if asked whether the deceased man was engaged in repairing the permanent way when he was brushing down and oiling the signal wires and point rods, would say that he was. The exact meaning of repair is perhaps not easy to define, but it contains, I think, some suggestion of putting right that which has gone wrong. It does not include the mere keeping in order by oiling, brushing or cleaning something, which is otherwise in perfect repair and only requires attention to prevent the possibility of its going wrong in the future. Moreover, the combining of "repairing" with "relaying," if it has any effect at all, seems to me to narrow, not to widen the meaning of the former word. The one word suggests renewal, the other the putting of something into proper order, not the prevention of some future fault. The combined words suggest the putting of the track into proper order, either by renewing or mending. In this last expression of opinion I do not find myself able to accept the view of the members of the Court of Appeal, who, as I understand, regard the words as pointing to a wide contrast between two activities. To me, on the contrary, they seem to point to the one general activity of putting in order, an activity which may, however, be carried out in one of two

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ways, either by renewing or mending. The case most strongly relied upon by the respondent was *Greg v. Planque* (1), where the Court of Appeal appears to have held that cleaning a chimney came within the designation of "repair." The allegation seems to have been that the defendant conducted operations upon the chimney, and he appears to have carried out work of repair elsewhere on the premises at the same time. With some hesitation Greer L.J. treated the word "repair" as covering the maintenance of the flue in the condition in which it ought to be to carry out the purposes for which it was placed where it was. The exact work done is nowhere specified. It seems to have exceeded mere routine sweeping; but, whatever it was, I do not find much assistance from the construction of other words in another collocation and dealing with another state of affairs.

It is, however, suggested that it would be unfortunate if men engaged in oiling the point slides, if rightly classed as permanent way men, should be protected, whereas men employed in oiling the point rods alongside them should not be, or that men working hand signals or point rods should be classed as permanent way men whereas men dealing with mechanical signals or point rods should not be. In either case, however, in my view the question is not are the one or the other permanent way men, but are they repairing the permanent way, and in either case I think they are not. If reason for the limitation of protection to men relaying or repairing the permanent way be required, it is, I think, to be found in the consideration that such men will for extended periods be concentrated on their work and unable to watch for oncoming trains whilst so engaged, whereas men cleaning, oiling or changing points by hand are only momentarily engaged and can ensure their own safety by looking to see the state of the line or lines before they undertake their job. I have only to add that, as in my view no repair within the meaning of the rule was being done, it becomes unnecessary to discuss the principle and limitation of the rule that, where a statute imposes a penalty (as this one does) and the obligation in respect of which the penalty is imposed is expressed in ambiguous terms, the more lenient construction of the section should be adopted so that the penalty may not be incurred in a doubtful case. For the reasons, however, stated above I would allow the appeal.

(1) [1936] 1 K. B. 669.

LORD SIMONDS. My Lords, in this case, the facts of which I need not recite, three questions appear to arise for your Lordships' consideration. I find it convenient to state them in the following order. First, were the deceased Berriman and his companion Rowe at the time of the fatal accident working on something that was part of the "permanent way"? Second, was Berriman, a "permanent way man"? Third, was he relaying or repairing the permanent way? Unless all these questions are answered in the affirmative, this appeal must succeed. I would answer each one of them in the negative. The action brought by Berriman's widow being founded on an alleged breach by the appellants of a statutory duty, I turn first to the Act under the authority of which was made the rule alleged to have been broken. By s. 1, sub-s. 1, of the Railway Employment (Prevention of Accidents) Act, 1900, the Board of Trade was authorized, subject to the provisions of the Act, to make such rules as they might think fit with respect to any of the subjects mentioned in the schedule to the Act with the object of reducing or removing the dangers and risks incidental to railway service. Amongst the subjects mentioned in the schedule, and the only one relevant to the present purpose, is No. 12 "Protection to permanent way men "when relaying or repairing permanent way." It was under the authority conferred by this section and schedule that the rule your Lordships have to consider was made and it is by reference to them that you must construe it. The rule in question is r. 9 of the Prevention of Accidents Rules, 1902. It prescribes that "With the object of protecting men working singly "or in gangs on or near the lines of railway in use for traffic "for the purpose of relaying or repairing the permanent way "of such lines the railway companies shall . . .": then there follow certain directions which admittedly the appellants did not in the present case observe. It will be noticed that the rule departs from the language of the Act. For "permanent way men" the expression is substituted "men "working singly or in gangs on or near the lines of railway," etc. But the rule must be construed by reference to the Act: the scope of the Act cannot be enlarged by a rule made under it. The question therefore is that which I have posed, "What "is meant by 'permanent way men' in the Act?" When that meaning has been ascertained, the rule must be read and, if necessary, limited accordingly. But before I consider this question which I have placed second in order, I must return

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to the first question which involves the consideration of the expression "permanent way." Here the same expression is used both in the Act and the rule. My Lords, I see no reason why I should not apply in the construction of this statute what I have always understood to be a cardinal rule in the construction of statutes, which is nowhere better stated than in *Unwin v. Hanson* (1). There the question was what was the meaning of the common English word "lop" in a highway statute and Lord Esher M.R. thus stated the principle: "If the Act is directed to dealing with matters affecting "everybody generally, the words used have the meaning "attached to them in the common and ordinary use of "language. If the Act is one passed with reference to a "particular trade business or transaction and words are used "which everybody conversant with that trade business or "transaction knows and understands to have a particular "meaning in it then the words are to be construed as having "that particular meaning though it may differ from the "common or ordinary meaning of the words." Here the statute under consideration relates to a particular industry and to a particular section in that industry. I am therefore bound to inquire whether the expression "permanent way" and equally the expression "permanent way men" have a particular meaning in that industry. The case is stronger than in *Unwin v. Hanson* (1). Everyone knows what the word "lop" means. Yet the inquiry was whether it had a special meaning. Here everyone may know what "permanent" means and what "way" means, but I venture to think that anyone's knowledge of what "permanent way" means is in proportion to his familiarity with the railway industry. It is not here as in the cited case a question of rejecting a general in favour of a special meaning. It is only by reference to the industry that the meaning can be ascertained and, though specialized experience or general observation may lead any of your Lordships to an opinion of great weight upon such a matter, yet it remains a question of evidence what the words mean in the industry. They are a term of art and it is by those skilled in the art that I must be instructed.

What I have said applies equally to "permanent way" and "permanent way men." I turn to the evidence for guidance. It is not entirely satisfactory, but it is all one way. Mr. Thompson who was described as the "Engineer, at York,

" of the London and North Eastern Railway " and " in charge of the civil engineering work of the Railway Company in " the North Eastern area " was called by the appellants. He was asked, " Does the expression ' permanent way ' " have some definite meaning to railway men ? " To this question counsel for the respondent objected but Stable J. allowed it, and, as I think, rightly allowed it. This may indeed be regarded as crucial. For, if such a question is not admissible, there is an end of the case and I at least am in darkness. But the question was allowed and was thus answered : " Beginning from the foundation so to speak, it " consists of ballast, sleepers, the chairs which carry the " rails, the rails themselves, and the fastenings which fasten the " rails to the sleepers and the rails to the chairs and also the " switches and crossings which form the junctions—which " are special forms of rails and chairs—and they include those " slide chairs that have been mentioned in this case, the " slide chair on which the point rail slides." This was the positive answer. In cross-examination he was asked a number of questions in relation to the connecting rods and other apparatus by which the point system was worked from the signal box with a view to obtaining an admission that these also were part of the permanent way. He unequivocally denied that they were and to the question, " Is not your " distinction between where the permanent way begins and " where it ends very artificial ? " replied " No, it is a very " clear cut distinction, so clear that some railways make two " departments divide at that point."

Similar evidence was given by Mr. Wallace, chief civil engineer of the London Midland and Scottish Railway. I need not refer to it in detail but would recall two questions and answers in cross-examination : " Q. If it (the final track) " includes points and points are included in permanent way, " is not the mechanism which moves the points included in " permanent way ? A. No." " Q. If points are included in " permanent way, why do you say that the mechanism which " gives life or usefulness to them are not included in the " permanent way ? A. Because they are part of the signalling. " The actuation of the points is part of the signalling." My Lords, here is uncontradicted evidence by two gentlemen highly competent to give such evidence upon the meaning in the railway world of the expression " permanent way." I can see no possible reason for rejecting it. If I have said that it is

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not entirely satisfactory, that is because it relates to the year 1944 and the relevant words occur in an Act of 1900. I should therefore have liked to have evidence relating to that time. But in the absence of any suggestion to the contrary I think I am entitled to assume that there has been no change in user. Some doubt has been cast upon the value of this evidence for this reason. It appears that, where points are moved by a hand lever and there is no connexion with the signalling apparatus, the "permanent way man" looks after such levers and they are treated as part of the permanent way. It is suggested that therefore any other apparatus, the function of which is to work the points, whether or not it is connected with the signalling-box, should be regarded as part of the permanent way. There is no force in this suggestion. There are bound to be border line cases. Hand levers for moving points are found "only in yards, in sidings and engine sheds" or goods yards or something of that. You are not allowed "to have hand-points on passenger roads." (I quote from the evidence.) The differentiation may not be entirely satisfactory from the point of view of scientific terminology, but it does not at all impair the value of the evidence that the apparatus which is connected with the signal-box is not part of the "permanent way." The evidence is even more cogent that "permanent way man" is an expression which describes a particular class of worker. I should have been surprised if there was not such evidence. It is not an expression that I should have expected to find in an Act of Parliament, if all that was meant was a man who was "working on certain tasks on the permanent way" or "whose duty is or includes working on the permanent way," these being the meanings ascribed by MacKinnon L.J. (1) and Morton L.J. (2). But whether my expectation is just or not, the evidence given by the same witnesses is conclusive that in the railway industry there is a definite category of workers known as "permanent way men," to which the deceased Berriman did not belong.

The final question is whether, when the fatal accident occurred, Berriman was engaged in relaying or repairing the permanent way. I assume for this purpose that the connecting rods and other apparatus are part of the permanent way and that he was a "permanent way man." My Lords, it is enacted by s. 11, sub-s. 1, of the Act under consideration that, if any railway company acts in contravention of or fails

(1) [1945] K. B. 462, 468.

(2) Ibid. 472.

to comply with any rule made under the Act, it shall be liable for each offence on conviction under the Summary Jurisdiction Acts to a fine not exceeding fifty pounds. I think that the same rule of construction must apply whether the duty and the penalty are imposed by the same section of an Act or by different sections of an Act or the one by a rule made under the Act and the other by the Act itself. That rule of construction is very well settled; though not always easy of application. I will state it by three familiar citations. In *Tuck & Sons v. Priester* (1), Lord Esher M.R. said: "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections." Lindley L.J. in the same case said (2): "... the well-settled rule that the court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it." Finally I will cite the words of James L.J. delivering the judgment of the Privy Council in *Dyke v. Elliott* (3): "Where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument according to the fair common sense meaning of the language used and the court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument." It was suggested, my Lords, that some distinction is to be made in the application of this rule according to the avowed purpose of the Act. It would, I think, be unfortunate if any decision of this House gave any colour to such a suggestion. Wherever the legislature prescribes a duty and a penalty for the breach of it, it must be assumed that the duty is prescribed in the interests of the community or some part of it and the penalty is prescribed as a sanction for its performance. Whether the purpose is, as it was in *Tuck's* case (4), the protection of copyright, or, as in the case before your Lordships, the protection of the life and limb of certain workers, the same principle prevails. A man is not to be put in peril upon an

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(1) (1887) 19 Q. B. D. 629, 638.

(3) (1872) L. R. 4 P. C. 184, 191.

(2) 19 Q. B. D. 629, 645.

(4) 19 Q. B. D. 629.

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ambiguity, however much or little the purpose of the Act appeals to the predilection of the court.

My Lords, in the present case it is upon the word "repairing" that the respondent relies. It is not suggested that the deceased was engaged in relaying the permanent way. He was in fact engaged with his companion, who shared his fate, in oiling the connecting rods and other apparatus by which the points were worked from the signal box. He may also have been engaged in cleaning the same apparatus, though this is not very clear from the evidence. It is probably irrelevant for I do not understand that any argument was founded on cleaning as distinct from oiling. The work upon which he was engaged was a matter of routine and did not arise out of any defect which he was instructed to put right. The question then is whether he was repairing the permanent way. Stable J. held that he was not; the Court of Appeal held otherwise, and I must examine the reasons that they gave. MacKinnon L.J. (1) thought that it was a nice point but that on the whole he was repairing it within the meaning of the rule: he accepted the suggestion that "repairing" really means maintenance. Lawrence L.J. (2) thought that in the context "repairing" referred to the work of maintenance which included all the routine repairs which have to be done to put the line in proper working order. Morton L.J. (3) agreed that in its context "repairing" means or includes "maintaining in good working order." My Lords, I cannot accept this view. I agree that every word must be construed in its context and I will in due course examine that context. But here is a common English word and it is legitimate and valuable to see what is its ordinary meaning. I do not doubt that apart from obsolete usage its meaning in the transitive sense is that which I find in the first dictionary that comes to my hand, "to restore to good condition by renewal" or replacement of decayed or damaged parts or by refixing "what has given way: to mend." It does not appear to me possible to bring within this definition the operation of oiling or cleaning or oiling and cleaning any article. A man oils his bicycle or his car. Does he repair it? He surely does not. I should be prepared to agree that, if some apparent functional disorder of a machine was cured by the simple process of oiling, it might be said that the workman

(1) [1945] K. B. 462, 470.

(3) Ibid. 474.

(2) Ibid. 471.

had repaired it by oiling it, though I think it would be a misuse of language. But here we have nothing but a routine precautionary measure, which I find it impossible to describe as repair. Had one of these workmen after oiling the apparatus been asked whether he had been repairing it, he would surely have answered, "No." And that is the answer which I must give unless the context compels me to something else than the ordinary meaning. What, then, is the context upon which the respondent relies? I can find none which in any way justifies a departure from the ordinary meaning of the word. Its immediate neighbour is "relaying." That juxtaposition affords no reason why the meaning of "repairing" should be enlarged. Then it is suggested that some context is found in the general scope and purpose of the Act. This is an argument which should carry no weight. Why should your Lordships conclude that the legislature using the word "repair" meant something else than ordinary men mean by repair? There is nothing irrational in thinking that some special protection is needed for workers who are engaged in relaying or repairing the permanent way but is not needed if they are engaged only in oiling and cleaning. I must decline, on some speculation as to what the legislature might have intended, to ascribe to the language of the Act a meaning that it does not naturally bear. Finally, remembering that rule of construction to which I have referred, I would in any case confine the word within its natural meaning. If it is reasonably capable of a wider meaning (which my deference to those who think so compels me to admit), at least it cannot be denied that the meaning that I have ascribed to it might reasonably and properly be entertained by the appellants. If so, an interpretation should not be adopted which involves them not only in civil liability but in penal consequences.

I do not think it necessary to examine at length the authorities to which your Lordships were referred. The only case which appears to have any bearing, and that remote, upon the present case is *Dredge v. Conway, Jones & Co.* (1), upon which both Lawrence L.J. and Morton L.J. (2) to some extent relied. It had been decided by the Court of Appeal in *Wood v. Walsh & Sons* (3), that painting the outside of a house was not repair within s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897. In *Dredge's* case (1) the same court

(1) [1901] 2 K. B. 42.

(3) [1899] 1 Q. B. 1009.

(2) [1945] K. B. 462, 470, 471, 474.

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H. L. (E.) treated this case as having been dissented from by this House in *Hoddinott v. Newton, Chambers & Co., Ltd.* (1), and held that since "painting, as one of the operations to which a building is exposed, comes under the head of repair" so also did whitewashing. Your Lordships are not, I think, concerned to question the correctness of this decision. But it does not appear to me to be a legitimate application of it to say that every operation, to which everything that forms part of the permanent way is subject, also falls under the head of repair. I concur in the motion that this appeal should be allowed.

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Appeal allowed.

THE HOUSE ordered that the order of the Court of Appeal be reversed and that, the parties having agreed that the compensation payable under the Workmen's Compensation Act, 1925, should be 400*l.* payable to the respondent, the said sum should be paid into Kingston-upon-Hull County Court and invested and administered on her behalf.

Solicitor for appellants : *Miles Beevor.*

Solicitors for respondent : *Pattinson & Brewer.*

(1) [1901] A. C. 49.

J. C.*

[PRIVY COUNCIL.]

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			AND		
THE KING	.	.	.	.	RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Nigeria)—Criminal law—Subpoena ad testificandum—Statutory provisions—Concurrent English common law right—Unconditional issue of subpoena—Supreme Court Ordinance, c. 3 of Laws of Nigeria, 1923, s. 14—Protectorate Courts Ordinance, No. 45 of 1933, s. 12.

The Ordinances and Rules in force in Nigeria governing the issue of subpoenas ad testificandum do not provide the only method by

* *Present* : LORD PORTER, LORD DU PARCQ and SIR JOHN BEAUMONT.

which such subpoenas can be obtained in the colony, for there exists therein, by virtue of s. 12 of the Protectorate Courts Ordinance, 1933, side by side with the Ordinances and Rules in appropriate cases, the English common law right of subpoena, which gives a right to the issue of subpoenas without the imposition of any conditions. Accordingly, where the trial judge refused to direct the issue of subpoenas at the request of the appellant until he had disclosed the purpose for which he desired to call the various witnesses, so that the judge might be satisfied that they could give relevant evidence, it could not be said that a grave miscarriage of justice had not occurred.

The provision in s. 62 of the Supreme Court Ordinance, 1914, that "in any cause or matter, and at any stage thereof, the court . . . may summon any person within the jurisdiction to attend to give evidence . . ." does not do away with the right of the subject to the issue of a subpoena as of course. It merely gives an additional right for the court to issue process at any stage either of its own motion or at the request of any party.

Veerabadravan Chetty v. Nataraja Desikar (1904) I. L. R. 28 M. 28, 36, referred to.

Judgment of the West African Court of Appeal reversed.

APPEAL (No. 85 of 1944) in forma pauperis, by special leave, from a judgment of the West African Court of Appeal (Kingdon C.J., Nigeria, Petrides C.J., Gold Coast, and Paul C.J., Sierra Leone) (April 27, 1940) which had dismissed the appellant's appeal against his conviction by the High Court of the Protectorate of Nigeria (John Asst. J.) (February 13, 1940), for breaking and entering a building and committing a felony therein. The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The only question raised by this appeal was whether the trial judge ought to have issued or caused to be issued subpoenas asked for by the appellant without attaching any conditions, or whether he was justified in requiring the appellant to satisfy him that there was a likelihood that the witnesses could give material evidence on the appellant's behalf. It was stated in the case for the appellant that he had served the sentence of seven years' imprisonment with hard labour to which he was sentenced by the trial judge.

1946. March 6, 7. *Elliot Gorst* for the appellant. There is nothing in the Nigerian Ordinances or Rules which compels a court to inquire into any matters in respect of the issue of a subpoena except, where a free subpoena is asked for, to inquire

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whether the applicant is in fact a pauper. The issue of a subpoena is as of course, and here there was a refusal in limine to issue a subpoena at all. [Reference was made to the relevant Ordinances and Rules: see the judgment of the Judicial Committee.] There is no fetter on an accused person to call any witnesses he likes. It is important to note that ss. 67 and 82 of the Criminal Procedure Ordinance, c. 20 of the Laws of Nigeria, 1923, both refer to specific moments in the trial; stress is laid on the words in s. 82, "at the close of the evidence" "in support of the charge." Section 12 of the Protectorate Courts Ordinance, 1933, which provides, inter alia, that the common law in force in England shall be in force within the jurisdiction of the Supreme Court of Nigeria, can be applied if there be any doubt about the matter being adequately covered by the other Nigerian statutory provisions. [Reference was made to *Raymond v. Tapson* (1), *Rex v. Baines* (2) and to Halsbury's Laws of England, 2nd ed., vol. 13, p. 733, para. 808.] In England a subpoena issues as of right unconditionally. In *Veerabadran Chetty v. Nataraja Desikar* (3) it was said, "it is" "not for him [the judge] to assume or infer that such witness" "is not likely to know anything of the matter in dispute or to" "be of any use to the party applying. That is a matter for the" "applicant himself to consider." In *Muhammad Nawaz v. King-Emperor* (4) one of the grounds on which a petition in a criminal case might properly be presented to the Board was that the accused "was not allowed to call relevant witnesses." There is an inherent duty placed on the court to ensure that no accused person is hampered in his defence by the refusal or neglect of the court to implement the rights which the law gives to an accused to assist him to prove his own case or to negative that for the prosecution. The right of an accused person who is in custody to call witnesses and to the production of documents is vested in every prisoner, and he should only be deprived of it by circumstances which render its reasonable enforcement impossible. It was the duty of the trial court both under Or. V, r. 1, of the Protectorate Courts Ordinance, 1933, and also as a matter of essential justice, to issue the summonses to witnesses to give evidence and to produce documents which the appellant requested, and the court had no discretion in the circumstances to refuse the application. It was

(1) (1882) 22 Ch. D. 430.

(2) [1909] 1 K. B. 258.

(3) (1904) 1 I. L. R. 28 M. 28, 36.

(4) (1941) L. R. 68 I. A. 126,

128.

not for the court to assume or infer that the witnesses asked for did not know anything material, and the only ground on which a summons to any such witness could have been lawfully refused was because it was evident that the witness was not being summoned bona fide and that the summons would therefore be an abuse of the process of the court. The appellant was unconditionally entitled to call such witnesses as he reasonably considered would help him in his defence, and the refusal of witness summonses made it impossible for him to put forward his defence to the charges made against him. The trial judge was not entitled to require the appellant to disclose to him, still less to the prosecution, the gist of the evidence expected from each witness. After the refusal to issue the subpoenas the conviction was unlawful and ought to be quashed. The refusal of the Court of Appeal to admit before them the evidence which the appellant desired, or otherwise to cause such evidence to be considered, amounted in the circumstances to a denial of justice.

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Sir Patrick Hastings K.C. and *Gahan* for the Crown. The appellant has asked the Board to interfere here on the well-known grounds specified in *Muhammad Nawaz v. King-Emperor* (1)—that there has been an infringement of the essential principles of justice. It is submitted that not only was this trial absolutely fair, but that the trial judge went to the extreme limits to ensure a fair trial. Further, he not only did what he was entitled to do, but what he was bound to do, in inquiring, before the issue of a subpoena in the circumstances of this case during the trial, whether or not it was a bona fide application—which could only be satisfied by a statement as to the purpose for which the evidence was required—or whether it was a delaying application, as he seems to have thought. Anybody can apply to subpoena witnesses, in Nigeria as in England, and it is the duty or, at any rate, the practice of the magistrate who commits people for trial on indictment to ask them (a) whether they want to call witnesses before him, and (b) whether they want witnesses to be called at the trial. That course was adopted in this case, and all the accused said “no” at that time. Before trial anybody is entitled to a subpoena, but according to the practice and law of Nigeria, because, no doubt, of various local difficulties, a limitation is put on the powers of the judge if he is required to issue

(1) L. R. 68 I. A. 126.

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subpoenas during the course of the trial. Section 67 of the Criminal Procedure Ordinance, c. 20 of the Laws of Nigeria, 1923, is made applicable to this particular trial, so if a prisoner during the trial asks for a witness to be called the judge can so direct, but before doing so he must be satisfied (a) that it is not owing to the defendant that the witness is not there, and (b) that if he is called he will be of some use. That is conclusive of this appeal. There was thus a statutory provision that was duly carried out ; this trial was regularly conducted, no substantial miscarriage of justice has occurred, and this appeal should be dismissed.

April 11. The judgment of their Lordships was delivered by LORD PORTER. This is an appeal, in forma pauperis, brought by special leave from a judgment of the West African Court of Appeal, dated April 27, 1940, whereby the appellant appeals against his conviction by the High Court of the Protectorate of Nigeria on February 13, 1940, for breaking and entering a building and committing a felony therein.

The appellant, a police constable, was charged, together with three other constables and three other persons, with having broken and entered a store at Ogbomosho and having stolen therefrom 300*l.* There were other indictments not now material. The charge was originally investigated in the District Magistrate's Court at Ibadan, and after the evidence had been given for the prosecution the appellant, together with the rest of the accused, reserved his defence. All seven defendants were then committed for trial at the next Ibadan Assizes. The trial began on February 1, 1940, when the appellant pleaded not guilty and stated that he was represented by a barrister—a Mr. Wells Palmer. As this gentleman was not in court the learned judge adjourned the trial until the following morning and gave instructions that a telegram was to be sent to Mr. Wells Palmer informing him of the adjournment. He also asked the police to give every facility to the appellant to get in touch with his lawyer or employ one locally if necessary. Mr. Wells Palmer replied that he was not appearing, and the trial proceeded on February 2, and continued on the following days. During that day's sitting a list of witnesses and documents was handed by the appellant to the court, but he refused to tell the police anything about the contents of the papers required for production or the evidence expected to be given by the witnesses whose names were set out. The learned judge at the

end of the sitting warned the appellant that he must give the gist of the evidence required, in order that it could be judged if relevant, and told him that if relevant, free subpoenas would be issued, but not otherwise. On February 3, the Solicitor-General, who was appearing for the prosecution, informed the court that he had endeavoured to assist the appellant to sort out his witnesses and documents. The appellant, however, had refused his assistance—quite rightly, as the learned judge observes in the course of his judgment—as he did not want to disclose his defence to the Crown's representatives.

The Solicitor-General appears mistakenly to have thought that the learned judge had instructed the police to assist the appellant and accordingly asked that they might be relieved from any further obligation to assist in collecting witnesses or documents. In the circumstances the learned judge reconsidered his decision and determined to see the accused in chambers on the rising of the court to discover what witnesses and documents would be necessary in the interests of justice to be produced on the appellant's behalf. In the course of this day's proceedings, and during the appellant's cross-examination of one of the prosecution witnesses, the Solicitor-General objected to one of the questions put as being irrelevant and the appellant thereupon informed the court that he would ask no more questions and make no statement until he got a lawyer. He did thereafter throughout the whole course of the trial remain mute and refuse to take any further part in the proceedings. Nevertheless, in accordance with his promise the learned judge saw the accused in his private room at the close of the day. At this interview the learned judge, the interpreter, the appellant and one other accused alone were present, though a police officer had been in the room originally and the Solicitor-General came in for a moment to say that all the necessary documents would be produced. On this occasion the appellant repeated his assertion that a lawyer was being sent to defend him, and was then asked to give a list of the names of the witnesses he wished to call, and the reasons for calling them, in order that subpoenas could be issued by the court to avoid delay. The reason for this requirement, the learned judgesays, was because it appeared that several were being called from Ondo and it was doubted if they could give any relevant evidence. The appellant replied that he did not wish to give the purpose for which his witnesses were being called and that a list had already been furnished. The learned judge seems to

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have thought this list confused and to have asked for a fresh one ; the accused man, however, failed to furnish a fresh list and again refused, whether from timidity, suspicion or obstinacy, to state the purpose for which he was calling his witnesses. Their Lordships have seen the list furnished by the appellant, and, though it contains a list of both witnesses and documents and, perhaps, might be clearer, think it sufficient to show the names of the witnesses desired and the places where they were to be found. At a later point in his judgment the learned judge states that on this occasion the accused was told that he would get no further assistance, and that he could make his own arrangements about subpoenas, but as the appellant was then, and had for some three months previously been, in prison, it is difficult to see what further arrangements he could make.

The appellant lodged an objection on the morning of February 5 against the case being continued before the learned judge because of what happened at the interview of February 3, and indeed, if his own statement is to be accepted, he made the same objection when the Solicitor-General contended that his cross-examination was irrelevant and the learned judge so ruled. In these circumstances the learned judge took the view that the appellant had lost heart when he was unable to shake the testimony of the principal witness for the prosecution and was adopting the course he had pursued for the purpose of endeavouring to intimidate the court and delay the proceedings and not from any genuine desire to have witnesses called. He accordingly proceeded with the trial and found the appellant and all save one of the other prisoners guilty, and sentenced the appellant to seven years' imprisonment. After his conviction the accused man obtained legal assistance and appealed to the Court of Appeal complaining (*inter alia*) of the refusal of the court to issue subpoenas, stating that his defence was an alibi, filing affidavits by himself and by his counsel and applying that he himself and his witnesses should be called to give evidence. This application was refused by the Court of Appeal and the conviction affirmed on April 27, 1940. From this dismissal he appeals to His Majesty in Council.

In these circumstances the only question which was, or could be, argued before their Lordships of the Judicial Committee was whether the learned judge ought to have issued or caused to be issued the subpoenas asked for without attaching any conditions, or whether he was justified in requiring the appellant

to satisfy him that there was a likelihood that the witnesses to be subpoenaed could give material evidence on the appellant's behalf. It was conceded by the Crown's representatives that if this question had arisen in England, an accused man could have applied for, and must have been furnished with, subpoenas without the imposition of any conditions. It is true that those subpoenas might afterwards have been set aside on its being shown that those to secure whose presence they were issued could give no relevant evidence, but the onus would be on them to satisfy the court to this effect. No consideration of that kind arises in the present case. It might, however, be said that there was no duty on the judge trying the case to see that the appropriate subpoenas were issued and that the taking of the necessary steps was a matter for the accused man. Some such suggestion is contained in the judgment of the learned judge when he says that at the vital interview the appellant was told that he would get no further assistance and could make his own arrangements about subpoenas. Their Lordships did not understand that this argument was put forward before the Board on behalf of the prosecution and in any case, as has been pointed out above, it is difficult to see how a man under arrest in the midst of a trial could take steps to ensure that subpoenas would be issued without the assistance of the court.

The representatives of the Crown, however, maintained that the position in Nigeria differed from that in England ; that the English rule was established by the common law, whereas the whole procedure in Nigeria was governed by the appropriate Ordinances and the procedure thereby made applicable. Before considering what procedure those Ordinances prescribe their Lordships would point out that the principal Ordinance dealing with the administration of justice in Nigeria is the Supreme Court Ordinance of October 1, 1914, c. 3 of the Laws of Nigeria, 1923. Section 14 of that Ordinance enacts that subject to the terms of that or any other Ordinance the common law, the doctrines of equity, and the statutes of general application which were in force in England on January 1, 1909, shall be in force within the jurisdiction of the court (i.e., the Supreme Court of Nigeria). This provision is repeated in s. 12 of the Protectorate Courts Ordinance, No. 45 of 1933. Section 62 of the earlier Ordinance ordains that " in any cause or matter, and " at any stage thereof, the court, either of its own motion or on " the application of any party, may summon any person within " the jurisdiction to attend to give evidence, or to produce any

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“ document within his possession, and may examine such person as a witness . . . and require him to produce any document in his possession or power, subject to just exceptions.” It is true that this latter section states only that the court *may* summon any person, but their Lordships do not think that this provision does away with the right of the subject to the issue of a subpoena as of course. It merely gives an additional right for the court to issue process at any stage either of its own motion or at the request of any party. Moreover, a similar provision contained in s. 159 of Act XIV of 1882 and s. 149 of Act VIII of 1859 of Madras was discussed in the courts of that province, and it was decided in *Veerabadrán Chetty v. Nataraya Desikar* (1) that a party is entitled to obtain a summons for the attendance of any witness on application before the day fixed for disposal of the case and the judge cannot under the sections referred to refuse the application.

The prosecution, however, rely on the terms of other sections of the Ordinances of Nigeria as showing that the judge trying the case has the right and duty to inquire into the relevancy of the evidence to be given before issuing a subpoena or directing it to be issued. As establishing this contention they refer to ss. 66 and 67 of the Criminal Procedure Ordinance of Nigeria, 1914 (c. 20 of the Laws of Nigeria, 1923). These sections are to be found in Part II of the Ordinance, which deals with “ Preliminary Investigations.” They read as follows:—
 Section 66. “ Immediately after the accused shall so have had opportunity of making his answer to the charge, the court shall ask him whether he desires to call any witnesses, and the depositions of such witnesses as the accused shall call and who shall appear on his behalf shall then be taken in the like manner as in the case of the witnesses for the prosecution : ”
 Section 67. “ If the accused person states that he has witnesses to call, but that they are not present in court, and the court is satisfied that the absence of the witnesses is not due to any fault or neglect of the accused, and that there is a likelihood that they could if present give material evidence on his behalf, the court may adjourn the investigation and issue process, or take other steps, to compel the attendance of such witnesses.”

On their face, and having regard to the heading and terms of this fasciculus of sections in which they appear, these sections apply only to the procedure at preliminary investigations. Part III, however, of the same Ordinance, which is headed

(1) (1904) I. L. R. 28 M. 28.

"Summary Trial," contains ss. 77 and 82, which provide:—
 Section 77. "Trials in Provincial Courts and before commissioners of the Supreme Court shall be conducted summarily in the manner and subject to the conditions laid down in this part of this Ordinance."

Section 82. "At the close of the evidence in support of the charge, if it appears to the court that the case is made out against the accused sufficiently to require him to make a defence, the court shall ask him if he wishes to say anything in answer to the charge, or has any witnesses to examine or other evidence to advance in his defence, and the court shall then hear the accused and his witnesses and other evidence, if any. If the accused states that he has witnesses to call but that they are not present, the court may, under the circumstances set forth in s. 67, take the steps therein mentioned to compel their attendance."

The Protectorate Courts Ordinance, No. 45 of 1933, substituted the jurisdiction of the High Court for that of the Supreme Court, and s. 14 of the Criminal Procedure (Amendment No. 2) Ordinance, No. 48 of 1933, repealed s. 77 of c. 20 and substituted for it the following section. "Trials before commissioners of the Supreme Court and magistrates and, subject to the provisions of the Protectorate Courts Ordinance, 1933, trials in the High Court shall be conducted summarily in the manner and subject to the conditions laid down in this part of the Ordinance": i.e., in accordance with the provisions of s. 82 set out above. Finally, The Protectorate Courts Ordinance, No. 45 of 1933, after dealing in Or. V, r. 1, with the summoning of witnesses in terms having a similar effect to those of s. 62 of the Supreme Court Ordinance of 1914, provides in "Part IV, Rules of Criminal Procedure, Or. xxxix. Rules for trials after committal to the High Court": "Criminal causes committed to the High Court for trial after a preliminary investigation shall not be tried upon information, but such trials shall be commenced by the court placing upon record the charge or charges made against the accused, and thereafter shall, subject to the provisions of s. 19 of the Ordinance and of any Orders made thereunder be conducted, so far as may be, in the manner laid down in Part III. of the Criminal Procedure Ordinance." The appellant was committed to the High Court for trial after a preliminary investigation and the other steps prescribed in the last-named order were followed. It follows that the provisions

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The Crown then argue that the only obligations of the court as to summoning witnesses are those contained in s. 62 of the Supreme Court Ordinance of 1914, or the similar terms of Or. V., r. 1, of the Protectorate Courts Ordinance of 1933 and s. 82 of the Criminal Procedure Ordinance of 1914. Both, they say, are permissive, not obligatory, and the latter requires in addition that the judge should be satisfied in accordance with the terms of s. 67 that the proposed witnesses should be likely to give relevant evidence on behalf of the accused. Their Lordships have already stated that in their view the former section, even if permissive, does not cover the whole field, but deals merely with the time at which, and the person at whose request, a subpoena may be issued. Moreover, it contains no provision enabling the court to be satisfied that the evidence to be given is relevant. The latter section, however, does contain such a provision and undoubtedly is made applicable by the later Ordinances not only to the procedure to be adopted where an investigation is taking place before a magistrate, but also to a summary trial and to a trial after previous investigation, but the question still remains, as it remained in the case of the earlier section, whether its provisions superseded the common law rights enjoyed by inhabitants of this country on January 1, 1909, or whether its provisions do not take away, but supplement those rights. In this connexion it was urged on behalf of the appellant that both s. 82 and ss. 66 and 67 are dealing with the procedure to be adopted at a particular moment in the trial, namely, after the case for the prosecution is closed and the accused has had an opportunity of answering the charge. It does not deal with the accused man's right to apply for a subpoena before or in the course of the trial, but only enables the court to adjourn and issue process even at the very end of the trial of the case. It would be strange if a man charged with a crime could only obtain a subpoena for the attendance of witnesses at the very end of his trial, and then subject to the discretion of the court whether it will grant an adjournment or not. In their Lordships' opinion the contention urged on behalf of the appellant is well founded.

As against this view it might, indeed, be argued that if it were to prevail an accused man could put off his application for the issuing of process to compel the attendance of witnesses until his trial was nearing its end and so not only delay its conclusion but also cause excessive inconvenience in the retention of

witnesses. Their Lordships would point out, however, that in the present instance the trial lasted some ten or eleven days after the first application made by the appellant to have his witnesses summoned and documents produced. So that this difficulty did not arise, at any rate in any pronounced form. In any case the court can always protect itself by issuing process, but if convinced that the lateness of the application is not due to genuine mistake or justified reason, it can refuse to adjourn the trial. In their Lordships' opinion the contention that the Ordinances and Rules in force in Nigeria provide the only method by which subpoenas ad testificandum can be obtained in the colony cannot be supported. In their view there exists, side by side with them in appropriate cases, the English common law right of subpoena. Having regard, therefore, to the fact that in their Lordships' opinion process ought to have issued at the request of the appellant without the imposition of the condition that he should disclose his reason for wishing to call the various witnesses set out in his list, they are unable to say that a grave miscarriage of justice has not occurred. They will accordingly humbly advise His Majesty that the appeal should be allowed.

Solicitors for appellant : *A. L. Bryden & Co.*

Solicitors for respondent : *Burchells.*

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THE UNITED PROVINCES . . . RESPONDENT.

ON APPEAL FROM THE FEDERAL COURT OF INDIA.

India—Legislative competency—Crown grant of land—Sanad—Rights of grantee infringed by Provincial legislation—Validity—Principles applicable—United Provinces Tenancy Act (U.P. Act XVII. of 1939)—Government of India Act, 1935 (25 & 26 Geo. 5, c. 42), s. 100, 7th sch., list II, item 21—Crown Grants Act (XV. of 1895), s. 3.

The Crown cannot deprive itself of its legislative authority by the mere fact that in the exercise of its prerogative it makes a grant

* *Present* : LORD MACMILLAN, LORD WRIGHT, LORD DU PARCQ, MORTON L.J. and SIR JOHN BEAUMONT.

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of land within the territory over which such legislative authority exists, and no court can annul the enactment of a legislative body acting within the legitimate scope of its sovereign competence. If, therefore, it be found that the subject-matter of a Crown grant is within the competence of a Provincial legislature nothing can prevent that legislature from legislating about it unless the Constitution Act itself expressly prohibits legislation on the subject either absolutely or conditionally. Accordingly, in the absence of any such prohibition, the United Provinces Tenancy Act, 1939, which, in consolidating and amending the law relating to agricultural tenancies and other matters connected therewith in Agra and Oudh, dealt with matters within the exclusive legislative competence of the Provincial legislature under item 21 of list II of the 7th sch. to the Government of India Act, 1935, was intra vires the Provincial legislature notwithstanding that admittedly some of its provisions cut down the absolute rights claimed by the appellant taluqdar to be comprised in the grant of his estate as evidenced by the sanad granted by the Crown to his predecessor.

Dictum of Luxmoore J. in *North Charterland Exploration Co. v. The King* [1931] 1 Ch. 169, at 187, applied.

The general words of s. 3 of the Crown Grants Act, 1895, cannot be read in their apparent generality. The whole Act of 1895 was intended to settle doubts as to the effect of the Transfer of Property Act, 1882, and must be read with reference to the general context, and cannot be construed to extend to the relations between a sanad holder and his tenants, and still less be construed to limit the statutory competence of the Provincial legislature under the Constitution Act.

Judgment of the Federal Court of India [1943] F. C. R. 72, affirmed.

APPEAL (No. 70 of 1944) by leave of the Federal Court of India from a judgment and order of that court (April 22, 1943), which had affirmed a decree of the Chief Court of Oudh at Lucknow (April 9, 1942).

The appellant was a taluqdar of Oudh whose predecessor, Babu Sitla Baksh Singh, after the Indian Mutiny of 1857 had obtained a sanad from the Governor-General conferring on him "the full proprietary rights, title and possession of the estate "of Bhawanshapur" in the taluqa Bhawanshapur in the Province of Oudh. In the action out of which this appeal arose the appellant claimed a declaration that the United Provinces Tenancy Act (U. P. Act XVII of 1939), which legislated in respect of agricultural tenancies on matters within the competence of the Provincial legislature under item 21 of list II of the 7th sch. to the Government of India Act, 1935, and which it was conceded did undoubtedly cut down the

absolute rights of the taluqdars of Oudh comprised in the grants evidenced by the sanads given by the Crown to their predecessors in title, was ultra vires the Provincial legislature. The respondent contended that the impugned Act was validly enacted.

The Chief Court of Oudh (Madeley J.) (to whom the suit was transferred for trial from the Court of the Civil Judge, Sultanpur), and, on appeal, the Federal Court of India (Gwyer C.J., Varadachariar and Zafrulla Khan JJ.), were of opinion that the United Provinces Tenancy Act was intra vires the Provincial legislature.

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1946. March 26. *Rewcastle K.C.* and *Khambatta* for the appellant, traced through the relevant documents and statutory provisions how the title of the appellant arose [see judgment of the Judicial Committee]. The point for determination is the question of the power of the Province to affect the title to the lands of the taluqdars of Oudh by virtue of the authority of the Province to make laws regulating the relation of landlord and tenant within the Province. It is conceded by the respondent that the United Provinces Tenancy Act, 1939, creates rights and interests in land in favour of other persons contrary to the sanad granted to the appellant's predecessor by the Crown and thus derogates from the terms of the Crown grant. It is submitted, as stated in one of the grounds in the plaint, that "the grant by the Crown being an act of State, the Provincial legislature had no right, authority or jurisdiction to "extinguish, modify, or in any other manner curtail the rights "conferred thereby." When the powers conferred on Provincial legislatures by the provisions of the Government of India Act, 1935, are examined, the terms in which they are conferred are not wide enough to enable them to pass a statute such as this impugned Act. The position in which these Crown grants had stood before the Act of 1935 was that there had been no interference of any sort until the passing of the Transfer of Property Act in 1882, which undoubtedly would have interfered with the position under the grants. There was then passed, however, the Crown Grants Act, 1895, which provided in s. 3 that "all provisions, restrictions, conditions and limitations "over contained in any such grant or transfer as aforesaid shall "be valid and take effect according their tenor, any rule of "law, statute or enactment of the legislature to the contrary "notwithstanding." Thus, the policy was that these Crown

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grants were not to be interfered with, and that was the situation up to 1935, and the question is whether, looking at the terms of the Constitution Act of 1935, there can necessarily be spelt into them an expression of the intention of Parliament to change that policy and interfere with these grants. Section 300 of the Act of 1935, which provides that "The executive authority of the Federation or of a Province shall not be exercised, " save on an order of the Governor-General or Governor " so as to derogate from any grant or confirmation of title of or to land" shows that this question was present in the minds of those who were responsible for that Act, and that they were minded to carry on the policy which had hitherto been adopted: see also ss. 299 and 298 of the Act of 1935. In the light of those general preserving provisions, and the existence of the bigger powers without interference with these Crown grants at all, there ought not to be read an intention to interfere with them. The United Provinces Tenancy Act is ultra vires the legislature of the United Provinces and is not made intra vires by the colourable exercise of jurisdiction given by the Constitution Act in item 21 of the Provincial legislative list.

Khambatta followed. The Constitution Act expressly provides for the subject-matter of a Crown grant in s. 300, sub-s. 1, and places it within the competence of the provincial executive to extinguish, modify or curtail the rights conferred by the Crown, and, therefore, by implication places the subject-matter of a Crown grant beyond the pale of the Provincial legislature.

Tucker K.C. and *Wallach* for the respondent were not called on.

May 1. The judgment of their Lordships was delivered by LORD WRIGHT. The appellant, who is the taluqdar of Bhawan-shapur, brought his action in the Court of the Civil Judge, Sultanpur, Oudh, claiming a declaration that the United Provinces Tenancy Act, 1939, is either ultra vires or not intra vires of the Provincial legislature, either in its entirety or at least as regards the provisions, about forty-two in number, scheduled to the complaint. His claim failed before the judge; he then appealed to the Federal Court of India, which dismissed the appeal but granted leave to appeal to this Board.

The appellant is the direct descendant of Babu Sitla Baksh Singh, who was grantee of a sanad from the Governor-General after the Indian mutiny of 1857. By this sanad the Crown

granted to the appellant's predecessor in title the full proprietary rights, the permanent heritable and transferable rights in the ancestral estate which were confirmed by the Oudh Estates Act (1 of 1869). That Act contains entries of the name of the appellant's predecessor in lists I and II of the lists prepared under s. 8 of the Act, the numbers of the entries being No. 241 and No. 108. List No. I contains a list of all persons who are to be considered taluqdars within the meaning of the Act. The position of the taluqdar is defined by s. 3 of the Act to be that he should be deemed to have thereby acquired a permanent, heritable and transferable right in the estate specified. The grant of the estate was, under s. 3, to be subject to all the conditions affecting the taluqdar contained in the orders passed by the Governor-General of India on October 10 and 19, 1859, and republished in the first schedule annexed to the Act, and subject also to all the conditions contained in the sanad under which the estate was held. These letters are set out in full in Chhail Bihari Lal's book on the taluqdari law of Oudh, at pp. 387 et seq. It is enough here to quote the passage in the letter of October 19, 1859, which is specially relevant to the questions involved in this case. This passage, which is set out in the judgment of Gwyer C.J. in the present appeal in the Federal Court, runs thus (1) :—

“ The sanads declare that while, on the one hand, the Government has conferred on the taluqdars and on their heirs for ever the full proprietary right in their respective estates, subject only to the payment of the annual revenue that may be imposed from time to time, and to certain conditions of loyalty and good service, on the other hand, all persons holding an interest in the land under the taluqdars will be secured in the possession of the subordinate rights, which they have heretofore enjoyed. The meaning of this is that, when a regular settlement of the Province is made, wherever it is found that zamindars or other persons have held an interest in the soil intermediate between the raiyat and the taluqdar, the amount or proportion payable by the intermediate holder to the taluqdar and the net jama finally payable by the taluqdar to the Government, will be fixed and recorded after careful and detailed survey and inquiry into each case, and will remain unchanged during the currency of the settlement, the taluqdar being, of course, free to improve his income and the value of his property by the reclamation of waste lands

(1) [1943] F. C. R. 79.

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“ (unless in cases where usage has given the liberty of reclamation to the zamindar), and by other measures of which he will receive the full benefit at the end of the settlement. Where leases (pattas) are given to the subordinate zamindars, they will be given by the taluqdar, not by the Government. This being the position in which the taluqdars will be placed, they cannot, with any show of reason, complain if the Government takes effectual steps to re-establish and maintain in subordination to them the former rights, as those existed in 1855, of other persons whose connexion with the soil is in many cases more intimate and more ancient than theirs ; and it is obvious that the only effectual protection, which the Government can extend to these inferior holders, is to define and record their rights, and to limit the demand of the taluqdar as against such person during the currency of the settlement to the amount fixed by the Government as the basis of its own revenue demand.”

The original sanad granted to the appellant's predecessor conferred the full proprietary right, title and possession of the estate specified in the kuboolyut, on the grantee and his heirs for ever, subject to the payment of such annual revenue as might from time to time be imposed and to certain conditions as to loyalty to the Crown. There was also a further condition that the grantee would, so far as is in his power, promote the agricultural prosperity of the estate and that all persons holding under him should be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations were observed by the grantee and his heirs in good faith so long would the British Government maintain the grantee and his heirs in their position as proprietors of the estate. The sanad was signed and sealed by George Udney Yule, Officiating Chief Commissioner of Oudh.

It is not here necessary to trace in any detail the history of the land settlement in Oudh which found its culmination in the measures referred to above. That history has been most completely and accurately expounded in the judgment of Gwyer C.J. in the Federal Court in this case, which will rank as the classic exposition of this important topic. It is enough to extract from the judgment a single passage (1) : “ From these documents [namely, certain dispatches and a letter which the Chief Justice refers to], which are all on record and which we have not therefore thought it necessary to set out in full, it

(1) [1943] F. C. R. 76-7.

“ appears that Lord Canning’s first and main pre-occupation
 “ was to secure the pacification of the province as speedily as
 “ possible ; and this he did not feel able to do so long as the
 “ taluqdars and other landholders continued to be bitterly
 “ opposed to him. He was not disposed to take too harsh a
 “ view of their attitude during the Mutiny, since they had
 “ become subjects of the Crown only a few months before it
 “ broke out and by the introduction of British rule many
 “ ‘ had suffered a loss of property and all had experienced a
 “ ‘ diminution of the importance and arbitrary power that they
 “ ‘ had hitherto enjoyed.’ He was disappointed that the
 “ proprietary village communities and the village zamindars
 “ had not taken the side of the Government during the Mutiny
 “ in spite of the policy which had instigated the first summary
 “ settlement in 1856. He had also begun to feel doubts about
 “ the views held by Lord Dalhousie’s Government on the
 “ subject of land tenures in Oudh ; and he recognized that many
 “ real injustices had been committed in the course of the
 “ settlement, which were calculated to alienate the taluqdars
 “ still further. Lastly, he had the predilection of an English
 “ nobleman of his generation for a territorial aristocracy of
 “ great families, who, subject to safeguards and restrictions
 “ which had been absent during the time of the nawabi, would
 “ form a stable and conservative element in a province hence-
 “ forward at peace. The confiscation proclamation was
 “ therefore only a means to an end. It gave the Government
 “ a tabula rasa for the initiation of a new land policy. It enabled
 “ them to restore dispossessed proprietors and thus enlist their
 “ sympathy and support, but also to remove some of the more
 “ glaring evils of the former system. It enabled them to
 “ establish the taluqdars as a powerful territorial aristocracy,
 “ but at the same time to recognize rights formerly enjoyed by
 “ under-proprietors. It was, in other words, an important
 “ part of Lord Canning’s policy of pacification ; and if the strict
 “ legal rights of individuals had to yield in some measure to
 “ more practical considerations of administrative convenience
 “ and expediency, there can be no doubt that the immediate
 “ effect was to bring peace and order to a distracted province.
 “ And it may well be that even those who suffered diminution
 “ in their legal rights have benefited in the long run by the
 “ restoration of the rule of law and a more settled system of
 “ government.”

This being the general nature of the settlement embodied in

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the sanads and in the Oudh Estates Act, 1869, it is now necessary to explain how the present dispute has arisen. In 1939, there was enacted the United Provinces Tenancy Act, 1939. The preamble states "Whereas it is expedient to "consolidate and amend the law relating to agricultural "tenancies and other matters connected therewith in Agra "and Oudh, it is hereby enacted as follows." The Act is an elaborate measure consisting of two hundred and ninety-six sections. Its general scope is sufficiently clear from the short title and preamble. It regulates and secures the rights of the tenants in various respects on lines sufficiently familiar in modern agricultural legislation. It is not contested that in doing so it impinges on the powers which, but for such a measure, the taluqdars might have exercised within their estates. What is claimed by the appellant is that the Act creates rights and interests in land in favour of other persons contrary to the sanad granted to the appellant (or his predecessor) by the Crown and thus derogates from the terms of the Crown grant, because it modifies or curtails the rights conferred by the Crown. It is not necessary to examine in detail the particulars set out in the plaint, and it has been conceded on behalf of the respondent that "some of the provisions of the Act do undoubtedly cut down "the absolute rights claimed by the taluqdars to be comprised "in the grant of their estates as evidenced by sanads such as "we have set out above." Their Lordships take the terms of this concession from the statement of its scope made by the judges of the Federal Court (1) and repeated before their Lordships. That relieves their Lordships from a precise consideration of what may have been the exact qualification of the taluqdars' rights embodied in the words of the sanad quoted above which aims at the protection of subordinate holders of the land. It is enough for present purposes to observe that some infringement of the rights of taluqdars under the sanad was in any event effected by the Act.

It is, however, clear that the claim put forward on behalf of the appellant is that the court should declare *ultra vires* and void an Act of a sovereign parliament such as that of Oudh. Under the Government of India Act, 1935, the Provincial legislatures (including that of the United Provinces) are given exclusive power to make laws for the province or any part thereof with respect to the matters enumerated in list II in the 7th sch. (s. 100 of the Act). Item 21 of list II enumerates as

(1) [1943] F. C. R. 81.

matters within the exclusive competence of the Provincial legislature " 21. Land, that is to say, rights in or over land, land " tenures, including the relation of landlord and tenant, and the " collection of rents ; transfer, alienation and devolution of " agricultural land ; land improvement and agricultural loans ; " colonization ; Courts of Wards ; encumbered and attached " estates ; treasure trove." This enumeration covers all the subjects dealt with in the Act of 1939. That Act was therefore within the express powers of the legislature which passed it. " It must always be remembered," said Gwyer C.J., in *United Provinces v. Atiqa Begum* (1) " that within their own sphere " the powers of the Indian legislatures are as large and ample " as those of Parliament itself." It is many centuries since the courts were invited to hold that an Act of Parliament was ultra vires or invalid in law on the ground that it infringed the prerogative of the Crown. So startling a claim as that made in the present case cannot be upheld. That broad and general principle is sufficient to dispose of the claim. No court can annul the enactment of a legislative body acting within the legitimate scope of its sovereign competence.

It is, however, desirable to examine the particular grounds on which it is sought to induce the court to arrive at this paradoxical conclusion. Some of these are said to be based on the general principle of law that the Crown cannot derogate from its own grant, others are said to depend on particular provisions of the Government of India Act. It has not been possible for the appellant to adduce any authority for the principle involved, which their Lordships apprehend to be that Parliament, whether Imperial, Federal or Provincial, in the absence of express prohibition, is debarred from legislating so as to vary the effect of a Crown grant. The appellant relies on certain express provisions of the Government of India Act. Thus he relies on s. 299 of the Act, which provides that no person shall be deprived of his property in British India save by authority of law, and that neither the Federal nor a Provincial legislature shall have power to make any law authorizing the compulsory acquisition of land for public purposes save on the basis of providing for the payment of compensation. But in the present case there is no question of confiscatory legislation. To regulate the relations of landlord and tenant and thereby diminish rights, hitherto exercised by the landlord in connexion with his land, is different from compulsory acquisition of the

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land. As to sub-s. 3 of s. 299, it was rightly decided by the Chief Court that the provisions of the sub-section did not apply. That ruling was not questioned before, or dealt with by, the Federal Court. Furthermore, in the view of that court the questions involved in the whole appeal were questions of legislative competence not merely of delay or precautionary safeguards. Their Lordships agree with that view. They completely concur in the opinion of the Federal Court that "if " once it be found that the subject-matter of a Crown grant is " within the competence of a Provincial legislature, nothing " can prevent that legislature from legislating about it, unless " the Constitution Act itself expressly prohibits legislation on " the subject, either absolutely or conditionally" (1). The appellant finally contended on this point that a sufficient prohibition is found in s. 300, sub-s. 1, which provides that the executive authority of the Federation or of a Province shall not be exercised save on an order of the Governor-General or Governor, as the case may be, in the exercise of his individual judgment, so as to derogate from any grant or confirmation of title of or to land. It is, however, clear on the face of this sub-section that it is only dealing with executive action, whereas here it is not executive authority which is in question but legislative competence and authority and legislative action. These different categories, namely, executive order as distinguished from legislative enactment, are so completely disparate and dissimilar that it does not seem necessary to say any more on the point. Their Lordships are content simply to express their agreement with the Chief Court and the Federal Court in rejecting the contention as irrelevant. Section 50, sub-s. 3, was also referred to in the course of the proceedings, but it is even more clearly irrelevant than s. 300.

Support may be found (if support is needed) for the general proposition that the Crown cannot deprive itself of its legislative authority by the mere fact that in the exercise of its prerogative it makes a grant of land within the territory over which such legislative authority exists. So the proposition is stated by Luxmoore J., in *North Charterland Exploration Co. v. The King* (2). In that case the Crown which made the grant was also the supreme legislative authority in the Protectorate, but the two powers were separate and distinguishable. Luxmoore J. observed " the doctrine of derogation from grant cannot be " applied in the case of a grant by the Crown so as to deprive it

(1) [1943] F. C. R. 86.

(2) [1931] 1 Ch. 169, 187.

“ of its paramount right [i.e., as the legislative authority] to
 “ legislate for the Protectorate in which the subject of the
 “ grant is situate. To do so would be to place the Crown with
 “ reference to any land granted by it in an inferior position
 “ to that occupied by other owners of land within the same
 “ Protectorate ” (1). No principle relevant to this case can be
 extracted from *Burrard Power Co., Ltd. v. The King* (2), where
 it was held that the legislative competence there in question
 belonged to the Dominion of Canada, not to the Province of
 British Columbia.

Their Lordships ought to refer in passing to the Crown Grants
 Act, 1895, s. 3 of which was relied on by the appellant. That
 section runs, “ All provisions, restrictions, conditions and
 “ limitations over contained in any such grant or transfer as
 “ aforesaid [i.e., one made by the Crown] shall be valid and
 “ take effect according to their tenor, any rule of law, statute or
 “ enactment of the legislature to the contrary notwithstanding.”
 These general words cannot be read in their apparent generality.
 The whole Act was intended to settle doubts which had arisen
 as to the effect of the Transfer of Property Act, 1882, and must
 be read with reference to the general context and could not be
 construed to extend to the relations between a sanad holder and
 his tenants. Still less could they be construed to limit the
 statutory competence of the Provincial legislature under the
 Constitution Act.

In conclusion their Lordships desire to quote with approval
 the language in which the Federal Court sums up its view
 of the whole position :—“ We desire, however, to point out
 “ that what they are now claiming is that no legislature in India
 “ has any right to alter the arrangements embodied in their
 “ sanads nearly a century ago ; and, for all we know, they would
 “ deny the right of Parliament itself to do so. We hope that
 “ no responsible legislature or government would ever treat as
 “ of no account solemn pledges given by their predecessors ;
 “ but the re-adjustment of rights and duties is an inevitable
 “ process, and one of the functions of the legislature in a modern
 “ State is to effect that re-adjustment, where circumstances
 “ have made it necessary, with justice to all concerned. It is
 “ however, not for this court to pronounce upon the wisdom or
 “ the justice, in the broader sense, of legislative acts ; it can
 “ only say whether they were validly enacted, and in the present
 “ case we are satisfied that neither the United Provinces

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“ Tenancy Act, 1939, as a whole, nor any of those provisions
 “ of it which are set out in the schedule to the plaint, are open to
 “ challenge on any of the grounds which have been argued
 “ before us ” (1).

Their Lordships will humbly advise His Majesty that in their opinion the appeal should be dismissed. The appellant will pay the costs of the appeal.

In dismissing the appeal their Lordships wish to make it clear that they express no opinion on two points mentioned in the case but not argued before their Lordships because neither party desired to raise them. Both parties in this appeal wished to have a decision on the merits. The points are (1.) whether a suit lies under s. 42 of the Specific Relief Act for a declaration that a provincial statute is ultra vires, and (2.), whether an appeal will lie from the judgment of a single judge of a High Court when the judgment is appealable to a Division Bench of the same High Court. In the circumstances of the particular case, their Lordships feel it is permissible to pass over these possible contentions without further comment, but their silence in that regard must not be taken to indicate that they have tacitly accepted either of them.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for respondent : *The Solicitor, India Office.*

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[PRIVY COUNCIL.]

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KELANI VALLEY MOTOR TRANSIT
 COMPANY, LIMITED APPELLANT ;

AND

COLOMBO-RATNAPURA OMNIBUS
 COMPANY, LIMITED RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND
 OF CEYLON.

Ceylon—Motor car—Omnibus—Licensing by route—Competitive applications—Statutory order of preference—Construction—“ Route ” limited to specified termini—Motor Car Ordinance (No. 45 of 1938)—Omnibus Service Licensing Ordinance (No. 47 of 1942), first sch., para. 1.

* Present : LORD WRIGHT, LORD DU PARCQ and SIR JOHN BEAUMONT.

By the first schedule to the Omnibus Service Licensing Ordinance (No. 47 of 1942): "1. In the event of applications being made "by two or more persons for road service licences in "respect of the same route the Commissioner shall "observe the following order of preference in deciding which "application should be granted:—(i.) Firstly, an application "from a company or partnership comprising the holders of all "the licences for the time being in force under the Motor Car "Ordinance, No. 45 of 1938, authorizing the use of omnibuses on "such route (ii.) Secondly, an application from a company "or partnership comprising the holders of the majority of the "licence holders referred to in sub-para. (i.)"

"Route" and "highway" in the Motor Car Ordinance, 1938, and in the Omnibus Service Licensing Ordinance, 1942, are not synonymous terms. It is of the essence of a route for which a licence is granted that it should run from one terminus to another. Accordingly, where the appellant and the respondent both made applications for road service licences to run omnibuses on the route between Colombo and Ratnapura, the Commissioner was entitled to take into account for the purpose of the first schedule to the Ordinance of 1942 only licences held by the applicants which were confined to the Colombo-Ratnapura route, and could not include licences held by them for routes which, although covering the whole of that route, also extended for certain further distances beyond either or both Colombo or Ratnapura.

Judgment of the Supreme Court of Ceylon (1943) 44 C. N. L. R. 352, affirmed.

APPEAL (No. 90 of 1945), by special leave, from a judgment of the Supreme Court of Ceylon on a case stated (June 21, 1943) reversing a majority decision of the Tribunal of Appeal constituted under the Motor Car Ordinance (No. 45 of 1938) (February 28, 1943) which had affirmed an order of the Commissioner of Motor Transport (January 13, 1943) granting to the appellant and refusing the respondent an exclusive road service licence under the Omnibus Service Licensing Ordinance (No. 47 of 1942) for the route from Colombo to Ratnapura.

The appellant and the respondent were competing operators of omnibuses, and the question in this appeal, which of them was entitled to the grant of an exclusive road service licence between Colombo and Ratnapura, depended on the facts of the case and the construction of the first paragraph of the first schedule to the Omnibus Service Licensing Ordinance, 1942, which provided as follows:—

"1. In the event of applications being made by two or more "persons for road service licences to come into force on or

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" before January 1, 1943, in respect of the same route or of
" routes which are substantially the same, the Commissioner
" shall, subject to the provisions of s. 4 of the Ordinance,
" observe the following order of preference in deciding which
" application should be granted :—

" (i.) Firstly, an application from a company or partnership
" comprising the holders of all the licences for the time being
" in force under the Motor Car Ordinance, No. 45 of 1938,
" authorizing the use of omnibuses on such route or on a
" route substantially the same as such route, or from a
" company or partnership which, or an individual who,
" has acquired the interests of the holders of all such licences.

" (ii.) Secondly, an application from a company or
" partnership comprising the holders of the majority of the
" licences referred to in sub-para. (i.), or from a company or
" partnership which, or an individual who, has acquired
" the interests of the holders of the majority of such licences."

Both the appellant and the respondent made applications for road service licences for the route Colombo to Ratnapura, and on January 13, 1943, the Commissioner of Motor Transport decided that in accordance with the provisions of the first schedule to the Ordinance of 1942, the appellant was entitled to the licence. It was not disputed that the respondent at the date of application had the greater number of licences confined to the route Colombo to Ratnapura, but if licences covering that route and extending beyond it were taken into account, the appellant had the greater number. On appeal to the Tribunal of Appeal that Tribunal, on February 28, 1943, by a majority of two to one, upheld the decision of the Commissioner. On the application of the parties, a case was stated by the Tribunal of Appeal to the Supreme Court and the case was heard on June 21, 1943, by de Kretser J., who overruled the decision of the Tribunal of Appeal, and held the respondent to be entitled to the licence. From that decision this appeal was brought.

1946. April 1. *Pritt K.C.* and *Stanley de Zoysa* for the appellant. When this case arose, the former system of granting licences to omnibuses in such a way that competing omnibuses would run on the same route had been changed to a system under which a route was to be licensed to only one operator under the title of an exclusive route licence, and at the change-over the criterion adopted was to give the exclusive right to

the operator who was doing the most work on that route. [Reference was made to the relevant provisions of the Motor Car Ordinance, 1938, and of the Omnibus Service Licensing Ordinance, 1942.] It is necessary to appreciate that the old and the new licences are different things, and that the people who are to get the licence for the new route are not people who had licences for the old route, but people whose licences authorized them to use omnibuses on that route or a route substantially the same. In considering whether a licence of the old type authorized the use of an omnibus on what is now *the* route to be considered under the Ordinance of 1942, a licence is good if it made it lawful for the operator to use his omnibus along the whole of what is now called *the* route, even if it had also authorized more than that. The matter lies in a very narrow compass. Any licence which permitted an omnibus to run on the entirety of the route Colombo to Ratnapura, while permitting in addition a further journey beyond either or both of these points, is a licence "authorizing the use of an omnibus on the route Colombo to Ratnapura." On the facts and on a true interpretation of the rule the appellant has the majority of licences entitled to be reckoned and should be granted the licence in question.

Sir Cyril Radcliffe K.C., L. M. D. de Silva K.C. and Handoo for the respondent. The short question ultimately turns on the construction of one phrase in the first schedule to the Ordinance of 1942. It is submitted that the only licences that can be counted under that schedule are those which authorized the holder to make the precise journey between two points, or substantially that journey. "Route" means a line of travel between two fixed termini. A route under the old system was something that was essentially defined by its termini, and the licences which were given under the old system were licences strictly confined to running the omnibuses between those termini and no other point. The holders of licences who have to be considered are therefore those who had licences for the Colombo-Ratnapura route and no-one else. The route had very great importance from the point of view of this system. On a proper construction of the schedule a person who has a licence for places from before and beyond the Colombo-Ratnapura service is not a holder of a licence which authorizes the use of omnibuses on the route Colombo-Ratnapura. The only licences that can be counted for the purposes of this first schedule are precisely those which make the

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service Colombo-Ratnapura, and since the respondent held the greater number—eleven to six in their favour—they should be granted the licence.

L. M. D. de Silva K.C. followed. If the appellant's argument is right, and licences in respect of omnibuses can be counted merely because on their journey they cover the distance between Colombo and Ratnapura, then those omnibuses of the respondent which cover part of the distance on the Colombo-Ratnapura route ought to be taken into account. The short point is that an omnibus may be used on a route without using the whole of the route. Though that proposition may be slender, it is nevertheless strongly fortified by the fact that that is the only interpretation under which it is possible to do justice to all persons holding licences in 1942.

Pritt K.C. replied.

May 7. The judgment of their Lordships was delivered by SIR JOHN BEAUMONT. The question at issue is whether the appellant or the respondent at the material date held the greater number of licences authorizing the use of omnibuses on the route Colombo to Ratnapura, and the answer to that question depends on whether the only licences to be reckoned under the relevant legislation are those confined to the route Colombo to Ratnapura, as the respondent contends, or whether licences covering the whole of that route and also some further distances beyond Colombo or Ratnapura or both are to be reckoned, as the appellant contends.

To determine this question it is necessary to notice the relevant provisions of the Motor Car Ordinance (No. 45 of 1938) (hereinafter referred to as "the original Ordinance") and the Omnibus Service Licensing Ordinance (No. 47 of 1942) (hereinafter referred to as "the amending Ordinance"). In the first schedule to the latter Ordinance occur the actual words which have to be construed. The original Ordinance, so far as relevant, contains the following provisions. Section 29, sub-s. 1, provides that no person shall possess or use a motor car for which a licence is not in force. Section 43, sub-s. 2 (a), provides that every applicant for a licence for an omnibus shall specify in his application particulars of the route or routes on which it is proposed to provide a service under the licence. Under s. 45, sub-s. 1 (a), every licensing authority shall forward to the Commissioner every application received by that authority for a licence for an omnibus, together with a recommendation on

the application. Under s. 47, the Commissioner, in deciding whether an application for a licence for an omnibus should be granted or refused, has to consider, amongst other things, whether by reason of the length of the proposed route or routes or the extent of the area covered thereby, the service under the licence will be efficient and likely to provide adequately for the needs of the public. Under s. 48, sub-s. 1, where, on an application for a licence for an omnibus, the Commissioner decides that the licence should be granted, he has to determine the route or routes in respect of which licences may be issued. Section 50 provides for an appeal from a decision of the Commissioner to the Tribunal of Appeal, of which the constitution and powers are defined by the Ordinance. Under s. 52 the Commissioner is required to communicate to each licensing authority his decision on applications made to him. Section 54, sub-s. 1, is important, and is in the following terms: "Every licensing authority shall specify on every licence for an omnibus issued by that authority—(a) the approved route or routes on which that omnibus may ply or stand for hire, and the number, if any, assigned to each route under s. 57; (b) the two places which shall be the termini of each such route; and (c) the highway or the several highways to be followed by the omnibus in proceeding from one terminus to the other." Under s. 57, sub-s. 1, the Commissioner may classify and number, in such manner as may be convenient, the approved routes in respect of which licences for omnibuses are issued, and he is required to publish in the *Gazette* a list of the routes so classified and numbered. Section 116 makes it an offence for an omnibus to ply or stand for hire on any route other than an approved route specified on the licence of that omnibus, or which, starting from one terminus of an approved route fails to complete a journey along that route to the other terminus, except as therein mentioned. It may be noticed also that form 12, which is the form of application for a licence for an omnibus, requires the application to state the route for which the licence is required, giving the two termini of the route and intermediate highways proposed to be followed, and the form of licence to be granted, which is form 18, states that the omnibus licence is to be used only on the specified route from one place to another.

It will be observed that the scheme of the original Ordinance was to license particular omnibuses to be used on specified routes. It would appear that that system led to undesirable

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competition, and under the amending Ordinance a system was introduced of licensing particular routes and assigning each route to a particular owner. Under s. 2, sub-s. 1, of the amending Ordinance it is provided that no omnibus shall, after the date specified, be used on any highway for the conveyance of passengers for fee or reward, except under the authority of road service licences issued by the Commissioner of Motor Transport under the Ordinance. Under s. 3, sub-s. 1 (a), every application for road service licences shall be made to the Commissioner in such form as he may provide, and has to contain "(a) particulars of the route or routes on which it is "proposed to provide the service." Section 4 specifies the matters to be considered by the Commissioner on application for road service licences, and amongst other things he is required to have regard to (1.) the suitability of the route or routes on which it is proposed to provide a service under the licence, (2.) the extent to which the needs of the proposed route or routes are already adequately served, and (3.) the needs of the area as a whole in relation to traffic. Section 5 provides that in any case where the Commissioner decides to grant any application for a road service licence for a regular service, he shall specify in the licence the route or routes on which the service is to be provided under the licence. Section 6 deals with the conditions which the Commissioner may attach to road service licences. Condition (e) provides that, in a case where licences are issued to different persons in respect of the same section of a highway, or where any route or part thereof lies within the administrative limits of any local authority, passengers shall not be taken up or shall not be set down except at specified points or between specified points. Section 7, sub-s. 1, provides "The issue of road service licences under this "Ordinance shall be so regulated by the Commissioner as to "secure that different persons are not authorized to provide "regular omnibus services on the same section of any highway : "Provided, however, that the Commissioner may, where he "considers it necessary so to do having regard to the needs "and convenience of the public, issue licences to two or more "persons authorizing the provision of regular omnibus services "involving the use of the same section of a highway, if, but "only if—(a) that section of the highway is common to the "respective routes to be used for the purposes of the services "to be provided under each of the licences, but does not "constitute the whole or the major part of any such route."

Section 13 regulates appeals from the Commissioner to the Tribunal of Appeal, and s. 18 directs that the provisions set out in the first schedule to the Ordinance shall apply in relation to the consideration by the Commissioner of applications for road service licences to come into force on or before January 1, 1943, in relation to the issue of any such licence.

[His Lordship then read the first paragraph of the first schedule, so far as material, to the Ordinance of 1942, and continued:] The second paragraph deals with compensation to be paid by a successful applicant to an unsuccessful rival, and this paragraph has been amended to meet the position under the judgment of the Supreme Court in this case. Their Lordships agree with the view of the Supreme Court that the provisions for compensation do not affect the question involved in this case, and they need not be discussed.

The difference of opinion between the expert authorities in Ceylon shows that the question at issue is not free from doubt, but it lies within a narrow compass and does not admit of elaborate discussion. It was agreed before the Tribunal, and in the Supreme Court, that the question really turned on whether the appellant could take into account for the purpose of the first schedule to the amending Ordinance, six omnibuses which had been licensed for the route Panadura to Badulla via Colombo and the low level road, since those omnibuses turned the scale between the parties. It appears that Panadura is some sixteen miles along the coast to Colombo, thence from Colombo to Ratnapura is some fifty miles, and from Ratnapura to Badulla is a further eighty miles. It is obvious, therefore, that the route Panadura to Badulla is not the same or substantially the same route as the route Colombo to Ratnapura, and this has never been the appellant's case. His case is that a licence for an omnibus on the route Panadura to Badulla is a licence authorizing the use of the omnibus on the route Colombo to Ratnapura, since the whole of that route is covered by the licence in respect of the longer route. If "route" has the same meaning as "highway" in the Ordinances this argument must prevail, since admittedly an omnibus running on the highway from Panadura to Badulla will pass over the whole of the highway between Colombo and Ratnapura, but in their Lordships' opinion it is impossible to say that "route" and "highway" in the two Ordinances are synonymous terms. In both Ordinances, particularly in s. 54 of the original Ordinance and s. 7 of the amending Ordinance, the two words are used, and

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certainly not interchangeably. A "highway" is the physical track along which an omnibus runs, whilst a "route" appears to their Lordships to be an abstract conception of a line of travel between one terminus and another, and to be something distinct from the highway traversed. If the Commissioner of Transport numbers routes, as he may do under s. 57, he is hardly likely to assign the same number to the route Colombo to Ratnapura as to the route Panadura to Badulla. The Commissioner has to work out the routes on which a public transport service is to be provided, and in so doing he may have to specify the highway to be followed by the route since there may be alternative roads leading from one terminus to another, but that does not make the route and highway the same. In their Lordships' view it is of the essence of a route for which a licence is granted that it should run from one terminus to another. That will ensure a service between the two termini, and may also provide, though with less certainty, a service for the use of intermediate places. But as de Kretser J. pointed out, theoretically, at any rate, an omnibus running from Panadura to Badulla may be full when it reaches Colombo or Ratnapura, and will not necessarily provide a service for either of those places. As counsel on both sides admitted, it is possible for a person of ingenuity to suggest anomalies, and even hardships, which may arise whichever construction is placed on the first schedule to the amending Ordinance, but such considerations cannot govern the question of construction if the words are clear.

For these reasons, which are substantially those which appealed to de Kretser J., their Lordships think that the decision of the Supreme Court was right. Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed, with costs.

Solicitors for appellant : *Buckeridge & Braune.*

Solicitors for respondent : *A. L. Bryden & Co.*

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[HOUSE OF LORDS.]

H. L. (E.)*

JOYCE APPELLANT ;

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Dec. 10, 11,
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DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT.

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*Criminal law—Treason—Adherence to the King's enemies without the realm—Alien—Local allegiance—Protection—British * passport—Protecting country left by alien—Allegiance not divested—Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2).*

In 1933 the appellant, an American citizen, who had resided in British territory for about twenty-four years, applied for and obtained a British passport, describing himself as a British subject by birth and stating that he required it for the purpose of holiday touring in Belgium, France, Germany, Switzerland, Italy and Austria. On its expiration, he obtained renewals on September 24, 1938 and on August 24, 1939, each for a period of one year, again describing himself as a British subject. After the outbreak of war between Great Britain and Germany and before the expiration of the validity of the renewed passport, he was proved to have been employed by the German radio company and to have delivered from enemy territory broadcast talks in English hostile to Great Britain. The passport was not found in his possession when he was arrested. Having been convicted of high treason he appealed :—

Held (1.) that an alien abroad holding a British passport enjoys the protection of the Crown and if he is adherent to the King's enemies he is guilty of treason, so long as he has not renounced that protection ; (2.) (per Lord Jowitt L.C., Lord Macmillan Lord Wright and Lord Simonds, Lord Porter dissenting) that the judge at the trial had given a proper direction to the jury who could not have failed to appreciate from it that it was for them to consider whether at the material times the appellant continued to enjoy the protection afforded by the passport.

Per Lord Porter : The renewal of the passport did not prove conclusively in law that the duty of allegiance continued until the passport ceased to be valid, unless some action on the part of the Crown or of the appellant put an end to that protection ; the onus was not on the appellant to show that the duty had been terminated.

Resolution of the judges of January 12, 1707, Foster's Crown Cases, 3rd ed., p. 185, discussed.

Decision of the Court of Criminal Appeal (sub nom. *R. v. Joyce*) [1945] W. N. 220 ; 173 L. T. 377, affirmed.

* *Present* : LORD JOWITT L.C., LORD MACMILLAN, LORD WRIGHT, LORD PORTER and LORD SIMONDS.

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APPEAL from the Court of Criminal Appeal.

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The facts, stated by Lord Jowitt L.C. and Lord Porter, were as follows : The appellant, William Joyce, was charged at the Central Criminal Court on three counts, upon the third of which only he was convicted. That count was as follows :

“ Statement of offence.

“ High Treason by adhering to the King’s enemies elsewhere than in the King’s Realm, to wit, in the German Realm, contrary to the Treason Act, 1351.

“ Particulars of offence.

“ William Joyce, on September 18, 1939, and on divers other days thereafter and between that day and July 2, 1940, being then—to wit on the several days—a person owing allegiance to our Lord the King, and whilst on the said several days an open and public war was being prosecuted and carried on by the German Realm and its subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without the Realm of England, to wit, in the Realm of Germany by broadcasting to the subjects of our Lord the King propaganda on behalf of the said enemies of our Lord the King.”

The first and second counts, upon which the appellant was found not guilty, were based upon the assumption that he was at all material times a British subject. This assumption was proved to be incorrect ; therefore upon these counts the appellant was acquitted.

The appellant was born in the United States of America, in 1906, the son of a naturalized American citizen who had previously been a British subject by birth. He thereby became himself a natural born American citizen. At about three years of age he was brought to Ireland, where he stayed until about 1921, when he came to England. He stayed in England until 1939. He was then thirty-three years of age. He was brought up and educated within the King’s Dominions, and he settled there. On July 4, 1933, he applied for a British passport, describing himself as a British subject by birth, born in Galway. He asked for the passport for the purpose of holiday touring in Belgium, France, Germany, Switzerland, Italy and Austria. He was granted the passport for a period of five

years. The document was not produced, but its contents were duly proved. In it he was described as a British subject. On September 26, 1938, he applied for a renewal of the passport for a period of one year. He again declared that he was a British subject and had not lost that national status. His application was granted. On August 24, 1939, he again applied for a renewal of his passport for a further period of one year, repeating the same declaration. His application was granted, the passport, as appears from the endorsement on the declaration, being extended to July 1, 1940. On some day after August 24, 1939, the appellant left the realm, his parents, his brothers and his sister remaining in England. The exact date and manner of his departure were not proved. On his arrest in the year 1945 there was found on his person a "work book" issued by the German State on October 4, 1939, from which it appeared that he had been employed by the German radio company of Berlin as an announcer of English news from September 18, 1939. In this document his nationality was stated to be "Great Britain" and his special qualification "English." The passport was not found and nothing further was known of it. It was proved by uncontradicted evidence that he had, between September 3, 1939, and December 10, 1939, broadcast propaganda on behalf of the enemy. He did not give evidence but in a statement made after his arrest in Germany he said (*inter alia*): "In 1940 I acquired German nationality As, by reason of my opinions, I was not conscientiously disposed to fight for Britain against Germany, I decided to leave the country Realizing, however, that at this critical juncture I had declined to serve Britain I drew the logical conclusion that I should have no moral right to return to that country of my own free will and that it would be best to apply for German citizenship and make my home in Germany." After argument on the law, Tucker J. said to counsel for the Crown and for the appellant: "I shall direct the jury on count 3 that on August 24, 1939, when the passport was applied for, the prisoner beyond a shadow of doubt owed allegiance to the Crown of this country and that on the evidence given, if they accept it, nothing happened at the material time thereafter to put an end to the allegiance that he then owed. It will remain for the jury, and for the jury alone, as to whether or not at the relevant dates he adhered to the King's enemies with intent

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“ to assist the King’s enemies. If both or either of you desire “ to address the jury on that issue, of course now is your “ opportunity.” Both counsel proceeded to address the jury, the defence submitting that the appellant had not adhered to the King’s enemies and the Crown that he had. No other topic was touched on and no argument was addressed to the question whether the appellant still had the passport in his possession and retained it for use or whether he still owed allegiance to the British Crown. Tucker J. then summed up and the appellant was found guilty on the third count of the indictment, and sentenced to death on September 19, 1945. An appeal was brought to the Court of Criminal Appeal on the following grounds: “ (1.) The court wrongly assumed juris- “ diction to try an alien for an offence against British law “ committed in a foreign country. (2.) The learned judge was “ wrong in law in holding, and misdirected the jury in directing “ them, that the appellant owed allegiance to His Majesty the “ King during the period from September 18, 1939, to July 2, “ 1940. (3.) That there was no evidence that the renewal of the “ appellant’s passport afforded him or was capable of affording “ him any protection or that the appellant ever availed himself “ or had any intention of availing himself of any such “ protection. (4.) If (contrary to the appellant’s contention) “ there were any such evidence, the issue was one for the jury “ and the learned judge failed to direct them thereon.” On November 7, 1945, the Court of Criminal Appeal dismissed the appeal. The Attorney-General certified under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought. The appellant accordingly appealed to the House of Lords.

Slade K.C., Curtis-Bennett K.C. and J. Burge for the appellant. It is clear that if this conviction be upheld an alien holding a British passport owes allegiance during its unexpired validity wherever he goes and no matter what he does. The case for the appellant rests on five submissions: (a) The local allegiance due from an alien continues so long only as he is personally present within the King’s dominions. (b) The protection which is the counterpart of the local allegiance due from an alien is the protection of our laws and is co-extensive with our legal jurisdiction. It is that which was referred to

in *Calvin's* case (1) in the maxim: *Protectio trahit subjectionem, et subjectio protectionem*. (c) Protection means the right to protection and not merely the de facto enjoyment of it, which might be had by a person who obtained a passport by fraud. (d) No court in this country has jurisdiction to try an alien for an offence alleged to have been committed abroad except only in the two cases of piracy *jure gentium* and an offence committed on board a British ship. Though the legislature would have power to make treason also an exception it has not done so. The Treason Act, 1351, speaks of "a man"—"home" is the actual word used—and the comity of nations requires that that word should be interpreted as a man owing allegiance to the Crown, that is to say a British subject wherever he may be or an alien so long only as he is physically present within the King's dominions. (e) There is no evidence that the renewal of the appellant's passport afforded him or was capable of affording him any protection or that he ever availed himself or intended to avail himself of such protection. Further, even if there was any such evidence, the issue was one for the jury and the learned judge failed to direct them on it. The submission which depends on local allegiance is complementary to that depending on jurisdiction, for whenever an alien leaves the realm local allegiance ceases and he can no longer be tried by the courts of this country. ✕As regards the first point, that an alien owes a local allegiance only so long as he resides within the King's dominions, the nature of allegiance has been long settled: see *Calvin's* case (2) and *In re Stepney Election Petition* (3). A man cannot be guilty of treason if he does not owe allegiance. An act which is treasonable if he owes allegiance is not treasonable if he does not. The allegiance due from an alien is accurately laid down in Blackstone's Commentaries, 1st ed., vol. 1, pp. 357-9: "Allegiance, both express and "implied, is however distinguished by the law into two sorts or "species, the one natural, the other local; the former being also "perpetual, the latter temporary. . . . Local allegiance "is such as is due from an alien, or stranger born, for so long "time as he continues within the King's dominion and protection: and it ceases the instant such stranger transfers "himself from this Kingdom to another . . . As therefore "the prince is always under a constant tie to protect his

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(1) (1608) 7 Co. Rep. 1a, 5a.

(3) (1886) 17 Q. B. D. 54, 64.

(2) Ibid. 1a, 4b, 5b.

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“ natural-born subjects, at all times and in all countries, for
 “ this reason their allegiance due to him is equally universal
 “ and permanent. But, on the other hand, as the prince
 “ affords his protection to an alien, only during his residence in
 “ this realm, the allegiance of an alien is confined (in point of
 “ time) to the duration of such his residence, and (in point of
 “ locality) to the dominions of the British empire”

Here residence means personal presence within the realm. It has been suggested that this principle is qualified by a passage in Foster's Crown Cases, 1792 ed., p. 185: “ And if such alien seeking the protection of the Crown, and having a family and effects here, should during a war with his native country, go thither, and adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the judges assembled at the Queen's command, January 12, 1707.” In the margin “ Mss. Tracy, Price, Dod and Denton ” are cited but the original manuscript cannot be found. This resolution, which is the only authority for the Crown, is also set out, quoting Foster, in Bacon's Abridgement, 7th ed., vol. VII., pp. 583-4, East's Pleas of the Crown, 1803 ed., vol. I., p. 53, Chitty's Prerogatives of the Crown, p. 13, and Hawkins' Pleas of the Crown, 8th ed., vol. I., p. 8 n., most of these treating it with reserve. It is bad law, quite inconsistent with *Johnstone v. Pedlar* (1), and merely the opinion of the judges in consultation with prosecuting counsel. It was not given as a decision in any case and so is not binding as an authority. An account of this practice may be found in an article on The History of the Parliamentary Declaration of Treason, by Professor Samuel Rezneck (1930) 46 Law Quarterly Review, p. 80, at pp. 85-7. It may be inferred that this resolution had reference to the statute 9 W. 3, c. 1, which made it treason for any person who had been in England before December 11, 1688, and had gone abroad, to return again without leave. *R. v. Lindsay* (2) and *R. v. Gregg* (3) were prosecutions under this Act. It would appear probable that the resolution was designed to show that there was no legal bar to trying Bara and Valiere mentioned in *R. v. Gregg* (4). See also Smollett's History of England, vol. II., p. 180. In any

(1) [1921] 2 A. C. 262, 292, 297.

(3) (1708) 14 St. Tr. 1371.

(2) (1704) 14 St. Tr. 987.

(4) Ibid. 1375.

event this resolution is inapplicable to the appellant who did not go from England during a war with his native country and did not leave his family or effects here. To bring the resolution into harmony with the law, "settled" must be given the meaning of "resident" and "resident" must mean physically present, without reference to the duration of the alien's stay here. [They also referred to Bacon's Abridgment, vol. I., p. 178, East's Pleas of the Crown, vol. I., p. 49, Hale's Pleas of the Crown, vol. I., p. 59, Chitty's Prerogatives of the Crown, pp. 10-12, 16 and Coke's Institutes, Part III., p. 4.]

As to the second proposition that the protection which draws allegiance is the protection of our laws, the appellant while in enemy territory was quite incapable of taking advantage of any protection which this country could have afforded him. He forfeited the right to it when he went to Germany in 1939. Since our laws are territorial they could not protect him there and no protection outside British territory could be such as to found a duty of allegiance. A passport is only a request to a foreign potentate and a command to a British representative to afford the holder assistance. After the appellant left England he did not enjoy the protection of British law and when war was declared even administrative protection was withdrawn from him. If on his trial he had been acquitted and had then proceeded to bring an action for damages in respect of his arrest in Germany and his being brought to England, the defence of act of state would have been a complete answer, since he was a foreigner outside British territory and outside the protection of the law: *Johnstone v. Pedlar* (1). [They also referred to Coke's Institutes, Part I., Book II., ss. 198-199; *Soufracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)* (2); *In re Stepney Election Petition* (3) and *R. v. Keyn* (4).]

As to the third proposition that protection means the right to protection and not merely the de facto enjoyment of it, no right to protection is derived from a British passport as such. Protection is derived from the fact of being a British subject and that is given whether one has a passport or not. A passport gives protection only in a colloquial sense, not that protection which is the counterpart of allegiance. It has no real legal significance and no rights flow from it.

(1) [1921] 2 A. C. 262, 272, 275, 276. (3) 17 Q. B. D. 54, 63.

(2) [1943] A. C. 203, 209, 212, (4) (1876) 2 Ex. D. 63, 150, 236, 223, 224.

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It is a mere voucher and means of identification. When day trips to the Continent could be made without passports British subjects who took advantage of them were not any the less entitled to the administrative protection of the Crown. If the appellant's contentions were wrong, strange consequences might arise. If a German, having masqueraded as a British subject till August, 1939, and then received intimation that war was about to break out, had obtained a British passport with a validity of five years, for the purpose of returning to his country, and had joined the German army within that period, he would have been liable to be convicted of treason. Again, if a British subject lawfully holding a British passport went to America and became naturalized there, then although by statute he ceased to be a British subject immediately on his naturalization, yet he would continue to owe allegiance to the British Crown for the unexpired term of his passport. [They referred to *De Jager v. Attorney-General for Natal* (1); *R. v. Brailsford* (2); *Carlisle v. United States* (3); *United States v. Villato* (4); two articles on Citizenship and Allegiance by Sir John Salmond (1901) 17 *Law Quarterly Review*, p. 270; (1902) 18 *Law Quarterly Review*, pp. 49, 61, 62; an article on The Passport System by W. N. Sibley (1906) 7 *Journal of Comparative Legislation* (N. S.), p. 26, and *Parl. Papers* (1872), vol. 70, c. 529 and (1887), vol. 81, c. 5168.]

On the fourth point that no British court has jurisdiction to try an alien for an offence alleged to have been committed abroad, even on the assumption that the appellant owed allegiance to the British Crown after leaving England, he could still not be tried here (1.) because no statute gives jurisdiction to try an alien for such an offence and (2.) because otherwise it would always be possible merely by alleging that any person owed allegiance to bring him within the jurisdiction of the courts of this country for trial of the question whether he owed allegiance or not. There is a distinction between substantive crime and the jurisdiction to try it. For the court to be able, merely by alleging allegiance to give itself jurisdiction to try the question of law whether or not there was allegiance would offend against the principle that no court can confer jurisdiction on itself. The court admittedly derives jurisdiction to try a British subject by alleging that he is a British subject, but there is a difference

(1) [1907] A. C. 326.

(2) [1906] 2 K. B. 730.

(3) (1872) 16 Wallace 147, 153.

(4) (1797) 2 Dallas 370.

between alleging that a person is a British subject, a fact which founds the courts jurisdiction if it is true, and alleging allegiance which is only a factor in the particular offence charged. Apart from the Naturalization Act, 1870, the general principle still holds good. *Nemo potest exuere patriam*. Nothing a man does can make him a British subject and nothing he can omit to do can prevent him from being a British subject if he was so born. In the case of a foreigner committing an offence outside British territory, British courts have no jurisdiction to try him : see Halsbury's Laws of England, 2nd ed., vol. IX., pp. 55-6, 62. In construing an Act of Parliament there is a presumption against a violation of international law : Maxwell on Interpretation of Statutes, 8th ed., p. 130. That applies to the Treason Act, 1351. Two later statutes dealt with the trial of treasons committed abroad, both of them purely procedural, the Treason Act, 1543 (35 Hen. 8, c. 2) and the Treason Act, 1551 (5 & 6 Edw. 6, c. 11), the latter repealed by the Treason Act, 1945 (8 & 9 Geo. 6, c. 44). The Treachery Act, 1940 (3 & 4 Geo. 6, c. 21), s. 4, shows how the legislature has regard to the comity of nations by its careful definition of the persons who can be guilty of offences created by the Act. The only possible application of that Act to an alien is in respect of an offence committed by him while subject to naval, military or air force law. [They referred to *Reg. v. Jameson* (1) ; *Macleod v. Attorney-General for New South Wales* (2) and *Attorney-General for Hong Kong v. Kwok-a-Sing* (3).]

5. On the final points that there was no evidence that the passport ever afforded the appellant any protection and that, if there was such evidence, the issue was one for the jury, even if the resolution of the judges in 1707 were correct, the effect of the ruling of Tucker J., would be to extend it, since none of the prerequisites set out in it were present in the case of the appellant. He left no family or effects in England and the protection which would have been afforded to them if he had bore no relation to the administrative protection alleged to be afforded by a passport. After the outbreak of war the British passport could afford the appellant no protection in Germany and there was no direct evidence that at any material time it remained in his possession. Even assuming that all the previous submissions for the appellant are wrong and that the mere granting of a passport

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(1) (1896) 2 Q. B. 425, 430, 431. (3) (1873) L. R. 5 P. C. 179, 198,

(2) [1891] A. C. 455, 459. 199.

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to an alien imports a duty of allegiance by him to the Crown, even so he must be able to divest himself of the protection which gave rise to the allegiance. It cannot be the law that whatever happens and in all circumstances the alien must continue under that allegiance for the period during which the passport happens to remain in force. Accordingly, it must be a question of fact in each case—it cannot be one of law—by what act and at what date he divested himself of the protection and the corresponding allegiance. The onus was on the Crown to prove that he had not done anything to divest himself of the protection of the passport. Even if the mere fact that he obtained a passport raised a *prima facie* case and shifted the burden of proof on to him, the question of fact involved must be left to the jury. It was the judge's duty in this case to direct them what the evidence was and to tell them that evidence which was sufficient to call for an answer from the defence was not necessarily enough to satisfy them. In any event the issue must be left to them and here it had not been. Tucker J. directed them as a matter of law that the appellant continued to owe allegiance throughout the currency of his passport. [They referred to *Stirland v. Director of Public Prosecutions* (1).] As regards *R. v. Casement* (2) that case is irrelevant to any of the issues raised by this appeal, because Casement was not an alien but a British subject. Moreover, it was, in any event, wrongly decided.

→ *Sir Hartley Shawcross A.-G.* and *Gerald Howard* for the Crown. The appellant contended that the judges' resolution of January 12, 1707, was the only authority for the Crown. That resolution was made in response to a summons from the sovereign to the judges to give their advice according to recognized legal procedure. However, even putting it aside it is sterile to search for an exact precedent to cover the present case. No branch of the law has been so much subject to judicial construction as that of treason. In this case the inducements to apply, not new principles, but existing principles to new facts are singularly compelling. On the appellant's point as to jurisdiction, there is no principle that no alien is triable in England for offences committed abroad. There is only a rebuttable presumption that statutes are not meant to have extra-territorial effect: see *Mortensen v. Peters* (3). In the Treason Act, 1351, the territory specified is

(1) [1944] A. C. 315.

(3) (1906) 8 F. (J. C.) 93, 100.

(2) [1917] 1 K. B. 98.

the world at large and there is express reference to treasons committed abroad. The words "a man" embrace any man under a duty of allegiance, whether a British subject or an alien. It would have made no difference if the appellant had been a German subject. The rule as to the locality of crime does not embrace treason, which is justiciable in this country even when committed abroad: see *R. v. Casement* (1). The appellant relied on the comity of nations but only those rules of international law which are generally and fully accepted are imported into our law. There is no rule of international law prohibiting the exercise of the jurisdiction of the court in a case such as this. In the case of *R. v. Jameson* (2) it was said in terms that the rule there laid down was based on international law. In the case of treason, if there is a duty of allegiance and a crime is committed in breach of that allegiance, the question of jurisdiction does not arise. ✕The question is not where treason can be committed, since it can be committed anywhere, but by whom it can be committed. ✕A duty of allegiance on the part of an alien may arise in several ways, by residence, by the taking of an oath, by service under the Crown or by grant of protection to him, as, for instance when he holds a British passport. The real basis of that allegiance is the protection afforded by the Crown and accepted by the subject: *Calvin's case* (3); *Coke's Institutes*, Part I., Book II., s. 199, and *Foster's Crown Cases*, 1792 ed., pp. 183-5. For the purpose of giving rise to allegiance, the vicarious protection contemplated by the judges' resolution is sufficient. Allegiance ceases when protection ceases. An alien physically present within the realm and under the protection of the Crown owes allegiance and a mere temporary absence from the country does not put an end to it, since it does not terminate residence for the purposes of the Treason Act. Residence means more than mere physical presence, though less than domicile. In the fourteenth century an alien departing from England was likely to go for good but now departure and return are easy. If an alien went out of the realm in a speed boat, committed treason and returned, it could not be denied that there was jurisdiction to try him in England. There can be no doubt that, if Germany had won the war, the appellant would have returned to England. His statement with regard to his acquisition of German nationality is not a thing on which he can rely, for it was not

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(1) [1917] 1 K. B. 98.

(3) 7 Co. Rep. 1a, 5a.

(2) [1896] 2 Q. B. 425, 430.

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an admission but an assertion in his own favour. Since he did not choose to go into the witness-box it is not evidence. The passport granted to him in 1933 was for the purpose of holiday touring. The renewals were unqualified and an application for plain renewal of a passport must be presumed to be for the same purpose as the original. A person going abroad for a holiday for a week or a month does not cease to be resident in this country. Moreover, the appellant did not need a British passport merely to leave England nor, if he could establish his American nationality, to enter the United States. One of the uses of a passport is that the country issuing it to any person is, under international conventions, bound to receive him back. Further, the passport was evidence that he was under the protection of the Crown. It was accepted as proof that he was a British subject and as such he acquired his position in Germany. It was the fact that he held himself out as such that made his broadcasts effective. As to the nature of the protection which a passport affords to an alien, it is not the protection of our laws. Originally, when protection depended on the strong arm of the feudal lord, aliens were granted by the Crown an executive protection against our laws, the passport enabling them to pass freely in this country, protected from the ordinary operation of laws which were highly restrictive and penal as regards foreigners. It was a document permitting them to travel within the state's own boundaries : see the article on *The Crown and the Alien* by E. F. Churchill (1920), 36 *Law Quarterly Review*, p. 402. There is not really any connexion between such a document and a modern passport, which is a matter of international practice. In modern practice the State takes under its protection persons who are not British subjects, who have then the status of protected persons and such was the appellant. Inasmuch as this species of protection is not the protection of our laws, even a British subject has no legally enforceable right to the protection of the Crown abroad. It is a prerogative right in the Crown to protect its own subjects abroad by diplomatic means and this was illustrated in 1850 in the incident of *Don Pacifico*. The exercise of the protective jurisdiction here contended for is well recognized in international law : see *Oppenheim on International Law*, 5th ed., p. 267 ; art. 7 of the *Draft Convention on Jurisdiction in Respect of Crime* (Harvard Research (1935), p. 545) and *Borchard on the Diplomatic Protection of Citizens Abroad*, pp. 10, 29. The passport is now the method by which the Crown accords

his protection to persons abroad. It is the sovereign's express command to his representatives that protection is to be given and in its normal functioning puts into operation the Crown's protective system. The resident alien shares now in the general protection of all the inhabitants of the realm but the passport holder has the benefit of a protective machinery going much further, even to the point of involving the country in war : see article on International Law in Practice by Sir William Malkin (1933), 49 *Law Quarterly Review*, p. 489, and *Encyclopædia of the Laws of England*, 2nd ed., vol. X., p. 585, et seq. This was the nature of the protection which in this case imposed on the appellant the duty of allegiance. Some dicta in the authorities, when divorced from their context, may appear to support the view that the protection to be afforded to produce that result is that of our laws, but the danger of treating dicta in that way is illustrated by *Soufracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)* (1). To impose the duty of allegiance it is enough if the State has accorded protection to a person seeking it and is able to give it to the extent recognized by international law. If the appellant's argument were right a subject of a British mandated, or even a British protected, territory, holding, as such a person does, a British passport, would be under no duty of allegiance to the Crown. That could have far-reaching and serious consequences. The appellant enjoyed exactly the same protection, whether it were called protection of law, or protection in fact, as any British subject would have enjoyed in the same circumstances at the same time. Though the right to protection might be in suspense, the duty of allegiance remained. Even in Germany after the outbreak of war the administrative protection was not withdrawn, though direct protection by the Crown's representatives might have come to an end. The Crown continued to exercise protection through the medium of the protecting power and the holder of a British passport might benefit from that. Thus, a British subject could not be called up to serve in the German army. In international law it is not open to a foreign state to disregard a British passport and deny its holder's nationality. It is immaterial that it may have been obtained by a false, or even a fraudulent, representation. The protection conferred continues until the Crown withdraws it. Similarly, just as a British subject can terminate his allegiance by becoming a naturalized

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citizen of a foreign state, so the protected person can by some overt act of substance terminate his allegiance, which does not necessarily continue during the whole of the passport's validity. The passport is evidence of the existence of protection and if the appellant had discarded it on a return to England that might make a difference, though his merely handing it back to a British consul in Germany might not justify this country in subsequently refusing to admit him. From the application for the passport and its renewals it must be presumed that the appellant used it for going abroad. That inference is a matter of accepted international law. Having sought the protection of the Crown, the appellant has also the burden of showing that it was not in fact afforded. The applications were the best prima facie evidence that he intended to avail himself of it. It was for him to show that he had by some overt act divested himself of the status he had acquired. Negative averments only in the knowledge of the accused and not of the Crown must be proved by him : Archbold's Criminal Practice (31st ed.) (1943), p. 330. The summing-up satisfied the tests laid down in *Stirland v. Director of Public Prosecutions* (1) approving *R. v. Haddy* (2). Once a man has obtained the general administrative and executive protection of the Crown, there is no principle limiting his allegiance by reference to cases where protection arose simply from the fact of residence. This case will have the important effect of defining the position of all persons who place themselves under the protection of the British Crown. The appellant voluntarily sought the protection which the Crown can give to a British subject travelling abroad. He had made his home in England and enjoyed all the privileges of British citizenship. It would be an unthinkable outrage if it were held that while temporarily absent he was absolved from the reciprocal duty of allegiance and could not be held to have committed treason.

Slade K.C. in reply. The appellant relies on the following principles : (1.) There is no reported case of an alien convicted of treason for an act committed abroad. (2.) There is no reported case of any court in this country having assumed jurisdiction to try an alien for an offence committed abroad. (3.) The appellant was convicted and his conviction was upheld on the strength of a resolution passed by the judges in 1707, which is contrary to every principle of constitutional law enunciated in the text-books. (4.) His conviction, since there

(1) [1944] A. C. 315, 321.

(2) [1944] K. B. 422.

was no evidence that he left any family or effects behind in England when he went to Germany in 1939, ran counter, not only to the law as it was laid down before that resolution, but also to the resolution itself. The relevant principles laid down by all the masters of the common law are more than dicta and *Calvin's* case (1), Blackstone's Commentaries and *Johnstone v. Pedlar* (2) are irreconcilable with that resolution. From *R. v. Lindsay* (3) and *R. v. Gregg* (4) it appears that the resolution was designed to satisfy Queen Anne that there was no constitutional difficulty in bringing Valiere and Bara to trial. It was framed when no counsel was present to call attention to *Calvin's* case (1) which had been unchallenged for a century before or to argue against its unconstitutional nature or the extent of its implications. The same procedure was adopted in 1660 before the trial of the Regicides, when the judges met and passed several resolutions, many of them bad law. Those trials would not have been a safe criterion for any civilized state. Of all the cases which have disfigured our legal history and outraged the common law, treason trials have been the worst. The judges' resolution of 1707 does not bear the imprimatur of the authors who reproduce it in the text-books and who use such phrases as "it is even stated." Moreover, the appellant's conviction and the judgment of the Court of Criminal Appeal are not consistent with the law as stated by Sir Michael Foster (Foster's Crown Cases, 1792 ed., pp. 183-5) and the resolution which he set out is not in accordance with his previous statement of the law; he said that the local allegiance of an alien ceased so soon as he withdrew his person and effects but in the present case the courts below held that this was not so if the alien held a British passport. Foster made it clear that the protection in question was that of our law. He referred (p. 184 n.) to the coronation oath whereby the sovereign undertakes to cause law to be executed. It is this which is the correlative of allegiance. If the gist of the matter is not the protection of the law there was no point in insisting on the necessity for the presence in this country of the alien's family or effects. The effect of this conviction is to contradict that and say that the protection attracting allegiance is not that of our law in the case of a person holding a British passport. But allegiance is derived from status, the status of a subject. A resident alien is a subject and when he ceases to reside he

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(1) 7 Co. Rep. 1a.

(3) 14 St. Tr. 787.

(2) [1921] 2 A. C. 262.

(4) 14 St. Tr. 1371, 1375.

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ceases to be a subject : see Sir John Salmond on Citizenship and Allegiance (1902) 18 Law Quarterly Review, pp. 49, 50. This is quite inconsistent with the judges' resolution of 1707. An alien soldier in the British service could not be tried for treason for an act committed abroad, for his oath of allegiance would not constitute the status of local allegiance. There is no reported case of an alien mercenary being tried for such an act. Before 1940 he would have been tried under s. 4 of the Army Act and since then he would be triable under the Treachery Act, 1940. There is no intermediate status between a British subject and an alien called a "British protected subject." The de facto protection afforded by a British mandate does not beget allegiance. British subjects alone are entitled when abroad to the protection of the Crown against other states : see Sir John Salmond on Citizenship and Allegiance (1901) 17 Law Quarterly Review, pp. 270, 271 ; *Abd-ul-Messih v. Farim* (1) ; *Markwald v. Attorney-General* (2) and *R. v. Ketter* (3). Even in the case of British subjects it lies within the Crown's discretion whether or not to take diplomatic action on behalf of one of its nationals : see the article by Sir William Malkin on International Law in Practice (1933) 49 Law Quarterly Review, pp. 489, 498-9, which does not deal with passports at all. It is a fallacy to suggest that any protection is afforded by a passport qua passport ; it is only an easy means of identification. An alien who has obtained a British passport, with whatever protection he might get from the belief that he is a British subject, can have no higher degree of protection than a British protected person, and that cannot found allegiance. The Crown admitted that this conviction would have been good in law if the appellant had been a German when he left the country. That would give rise to extraordinary situations, so that if a German spy wished, in obedience to his natural instincts to return to Germany when war with England became imminent and obtained a British passport, since that was the only way he could go out of the country, he would be held guilty of treason. As regards jurisdiction, there is no case in which a court in England has assumed jurisdiction to try an alien for an offence committed abroad : see *Mortensen v. Peters* (4) ; *Johnstone v. Pedlar* (5) ; *The Fagernes* (6).

- (1) (1888) 3 App. Cas.
431, 443.
(2) [1920] 1 Ch. 348, 355.
(3) [1940] 1 K. B. 787, 788.

- (4) (1906) 8 F. (J. C.) 93.
(5) [1921] 2 A. C. 262.
(6) [1927] P. 311.

As regards the case of *De Jager v. Attorney-General for Natal* (1) that was a bad decision: see the discussion of it in *Current Notes on International Law* (1908) 33 *Law Magazine and Review*, 4th series, pp. 214-18. In general, it is a singularly sterile process to try to interpret the *Treason Act, 1351*, by reference to modern concepts of international law, which did not then exist in more than an embryonic state. Confusion has arisen between the intention with which the appellant left England, whether he had any *animus revertendi*, and the use which he may have made of the passport after he got to Germany. The fact of his joining the German radio organization indicated an intention not to return and a casting off of any protection provided by the passport. He had deserted what he took to be a sinking ship and any intention he may have had of returning was not a return to the Crown's allegiance but with a victorious German army. As regards the passport so far as the evidence goes he might have thrown it overboard during the sea crossing from England. There is no complaint of the judge's summing-up on the facts proved in evidence but he failed to direct the jury on facts about which no evidence had been given but which were for them and on an issue which should have been left to them. Even if it was for the appellant to show what was done with the passport the judge should have directed the jury on that matter. Further, he directed them as a matter of law that the appellant continued to owe allegiance to the Crown at the material times and that was an issue which should have been left to them. It could not be said that a reasonable jury if they had received the directions which were lacking would necessarily have reached the same conclusion. Since the issue was not put to the jury at all the proviso to s. 4, sub-s. 1 of the *Criminal Appeal Act, 1907*, does not operate.

December 18, 1945. LORD JOWITT L.C. I have come to the conclusion, in common with the majority of your Lordships, that the appeal should be dismissed. I should propose to deliver my reasons at a later date.

LORD MACMILLAN. I agree.

LORD WRIGHT. I also agree.

LORD PORTER. In agreement with all your Lordships, I think that the renewal of his passport, which Joyce obtained

(1) [1907] A. C. 326.

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on August 24, 1939, was evidence from which the jury might have inferred that he retained that document for use up to September 18 of that year, when he was proved to have first adhered to the King's enemies, and might, therefore, have inferred that he continued to owe allegiance to the Crown up to that date. As, however, in my view, the question whether he did so retain it was never left to the jury, but they were directed as a matter of law that his duty of allegiance was extended to the later date, and as your Lordships cannot send the case back for retrial, I would myself allow the appeal on that ground.

LORD SIMONDS. I concur in the opinion given by my noble and learned friend on the woolsack.

February 1, 1946. Their Lordships delivered their reasons.

LORD JOWITT L.C. My Lords, on November 7, 1945, the Court of Criminal Appeal dismissed the appeal of the appellant, William Joyce, who had on September 19, 1945, been convicted of high treason at the Central Criminal Court and duly sentenced to death. The Attorney-General certified under s. 1, sub-s. 6, of the Criminal Appeal Act 1907, that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought. Hence this appeal is brought to your Lordships' House. And though, in accordance with the usual practice, the certificate of the Attorney-General does not specify the point of law raised in the appeal, it is clear that the question for your Lordships' determination is whether an alien who has been resident within the realm can be held guilty and convicted in this country of high treason in respect of acts committed by him outside the realm. This is in truth a question of law of far-reaching importance. The appellant was charged at the Central Criminal Court on three counts, upon the third of which only he was convicted. The first and second counts, upon which he was found not guilty, were based upon the assumption that he was at all material times a British subject. This assumption was proved to be incorrect; therefore upon these counts the appellant was rightly acquitted. The Court of Criminal Appeal, as I have already said, dismissed the appeal, and it will be convenient if I deal with the grounds of appeal in the same order as did that court, first considering

the important question of law raised in the second ground.

The House is called upon in the year 1945 to consider the scope and effect of a statute of the year 1351, the twenty-fifth year of the reign of Edward III. That statute, as has been commonly said and as appears from its terms, was itself declaratory of the common law: its language differs little from the statement in Bracton (see *De Legibus et Consuetudinibus Angliæ* (No. 70 Rolls Series), vol. II., p. 258; Stephen's *History of the Criminal Law*, vol. II., p. 243). It is proper to set out the material parts. Thus it runs: "Whereas divers
"opinions have been before this time in what case treason shall
"be said and in what not; the King, at the request of the
"Lords and of the Commons hath made a declaration in the
"manner as hereafter followeth, that is to say;" [amongst other things] "if a man do levy war against our Lord the King
"in his realm, or be adherent to the King's enemies in his realm,
"giving them aid and comfort in the realm, or elsewhere"
then (I depart from the text and use modern terms) he shall be guilty of treason. It is not denied that the appellant has adhered to the King's enemies giving them aid and comfort elsewhere than in the realm. Upon this part of the case the single question is whether, having done so, he can be and in the circumstances of the case is guilty of treason. Your Lordships will observe that the statute is wide enough in its terms to cover any man anywhere, "if a man do levy war," etc. Yet it is clear that some limitation must be placed upon the generality of the language, for the context in the preamble poses the question "in what case treason shall be said and in what not." It is necessary then to prove not only that an act was done but that, being done, it was a treasonable act. This must depend upon one thing only, namely the relation in which the actor stands to the King to whose enemies he adheres. An act that is in one man treasonable, may not be so in another. In the long discussion which your Lordships have heard upon this part of the case attention has necessarily been concentrated on the question of allegiance. The question whether a man can be guilty of treason to the King has been treated as identical with the question whether he owes allegiance to the King. An act, it is said, which is treasonable if the actor owes allegiance, is not treasonable if he does not. As a generalization, this is undoubtedly true and is supported by the language of the indictment, but it leaves undecided the question by whom allegiance is owed and I shall ask your Lordships to look

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somewhat more deeply into the principle upon which this statement is founded, for it is by the application of principle to changing circumstances that our law has developed. It is not for His Majesty's judges to create new offences or to extend any penal law and particularly the law of high treason, but new conditions may demand a reconsideration of the scope of the principle. It is not an extension of a penal law to apply its principle to circumstances unforeseen at the time of its enactment, so long as the case is fairly brought within its language.

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I have said, my Lords, that the question for consideration is bound up with the question of allegiance. Allegiance is owed to their sovereign Lord the King by his natural born subjects ; so it is by those who, being aliens, become his subjects by denization or naturalization (I will call them all "naturalized subjects") ; so it is by those who, being aliens, reside within the King's realm. Whether you look to the feudal law for the origin of this conception or find it in the elementary necessities of any political society, it is clear that fundamentally it recognizes the need of the man for protection and of the sovereign lord for service. "Protectio trahit subjectionem" "et subjectio protectionem." All who were brought within the King's protection were *ad fidem regis* : all owed him allegiance. The topic is discussed with much learning in *Calvin's case* (1). The natural-born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm. By what means and when can they cast off allegiance ? The natural-born subject cannot at common law at any time cast it off. "*Nemo potest exuere patriam*" is a fundamental maxim of the law from which relief was given only by recent statutes. Nor can the naturalized subjects at common law. It is in regard to the alien resident within the realm that the controversy in this case arises. Admittedly he owes allegiance while he is so resident, but it is argued that his allegiance extends no further. Numerous authorities were cited by the learned counsel for the appellant in which it is stated without any qualification or extension that an alien owes allegiance so long as he is within the realm and it has been argued with great force that the physical presence of the alien actor within the realm is necessary to make his act treasonable. It is implicit in this argument that during absence from the realm, however

brief, an alien ordinarily resident within the realm cannot commit treason; he cannot in any circumstances by giving aid and comfort to the King's enemies outside the realm be guilty of a treasonable act. My Lords in my opinion this which is the necessary and logical statement of the appellant's case is not only at variance with the principle of the law, but is inconsistent with authority which your Lordships cannot disregard. I refer first to authority. It is said in Foster's Crown Cases (3rd ed.), p. 183—"Local allegiance is founded in the "protection a foreigner enjoyeth for his person, his family or "effects, during his residence here; and it ceaseth, whenever "he withdraweth with his family and effects." And then on p. 185 comes the statement of law upon which the passage I have cited is clearly founded "Section 4. And if such alien, "seeking the protection of the Crown, and having a family "and effects here, should during a war with his native country, "go thither, and there adhere to the King's enemies for purposes "of hostility, he might be dealt with as a traitor. For he "came and settled here under the protection of the Crown; "and, though his person was removed for a time, his effects "and family continued still under the same protection. This "rule was laid down by all the judges assembled at the Queen's "command January 12, 1707." The author has a side note against the last line of this passage "MSS. Tracey, Price, Dod "and Denton." These manuscripts have not been traced but their authenticity is not questioned. It is indeed impossible to suppose that Sir Michael Foster could have incorporated such a statement except upon the surest grounds and it is to be noted that he accepts equally the fact of the judges' resolution and the validity of its content. This statement has been repeated without challenge by numerous authors of the highest authority—e.g., Hawkins, Pleas of the Crown, 1795 ed., c. II., s. 5, n. (2.); East, Pleas of the Crown, vol. I., p. 52; Chitty on the Prerogatives of the Crown, pp. 12, 13. It may be said that the language of some of these writers is not that of enthusiastic support, but neither in the text books written by the great masters of this branch of the law nor in any judicial utterance has the statement been challenged. Moreover it has been repeated without any criticism in our own times by Sir William Holdsworth whose authority on such a matter is unequalled: see his article in Halsbury's Laws of England (2nd ed.), vol. VI., p. 416 n. (t.), title "Constitutional "Law." Your Lordships can give no weight to the fact that in

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such cases as *Johnstone v. Pedlar* (1), the local allegiance of an alien is stated without qualification to be coterminous with his residence within the realm. The qualification that we are now discussing was not relevant to the issue nor brought to the mind of the court. Nor was the judges' resolution referred to nor the meaning of "residence" discussed. In my view therefore it is the law that in the case supposed in the resolution of 1707 an alien may be guilty of treason for an act committed outside the realm. The reason which appears in the resolution is illuminating. The principle governing the rule is established by the exception: "though his person was removed for a time, his family and effects continued under the same protection," that is, the protection of the Crown. The vicarious protection still afforded to the family, which he had left behind in this country, required of him a continuance of his fidelity. It is thus not true to say that an alien can never in law be guilty of treason to the sovereign of this realm in respect of an act committed outside the realm. My Lords, here no question arises of a vicarious protection. There is no evidence that the appellant left a family or effects behind him when he left this realm. I do not for this purpose regard parents or brother or sisters as a family. But though there was no continuing protection for his family or effects, of him too it must be asked, whether there was not such protection still afforded by the sovereign as to require of him the continuance of his allegiance. The principle which runs through feudal law and what I may perhaps call constitutional law requires on the one hand protection, on the other fidelity: a duty of the sovereign lord to protect, a duty of the liege or subject to be faithful. Treason, "trahison," is the betrayal of a trust: to be faithful to the trust is the counterpart of the duty to protect. It serves to illustrate the principle which I have stated that an open enemy who is an alien, notwithstanding his presence in the realm, is not within the protection nor therefore within the allegiance of the Crown. He does not owe allegiance because although he is within the realm he is not under the sovereign's protection.

The question then is how is this principle to be applied to the circumstances of the present case. My Lords, I have already stated the material facts in regard to the appellant's residence in this country, his applications for a passport and the grant of such passport to him and I need not restate them. I do not think it necessary in this case to determine what for the purpose

of the doctrine, whether stated with or without qualification, constitutes for an alien "residence" within the realm. It would, I think, be strangely inconsistent with the robust and vigorous commonsense of the common law to suppose that an alien quitting his residence in this country and temporarily on the high seas beyond territorial waters or at some even distant spot now brought within speedy reach and there adhering and giving aid to the King's enemies could do so with impunity. In the present case the appellant had long resided here and appears to have had many ties with this country, but I make no assumption one way or another about his intention to return and I do not attach any importance to the fact that the original passport application and, therefore, presumably the renewals also were for "holiday touring." The material facts are these, that being for long resident here and owing allegiance he applied for and obtained a passport and, leaving the realm, adhered to the King's enemies. It does not matter that he made false representations as to his status, asserting that he was a British subject by birth, a statement that he was afterwards at pains to disprove. It may be that when he first made the statement, he thought it was true. Of this there is no evidence. The essential fact is that he got the passport and I now examine its effect. The actual passport issued to the appellant has not been produced, but its contents have been duly proved. The terms of a passport are familiar. It is thus described by Lord Alverstone C.J., in *R. v. Brailsford* (1): "It is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries." By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification. But the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed. It is

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(1) [1905] 2 K. B. 730, 745.

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immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects. By his own act he has maintained the bond which while he was within the realm bound him to his sovereign. The question is not whether he obtained British citizenship by obtaining the passport, but whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad.

Your Lordships were pressed by counsel for the appellant with a distinction between the protection of the law and the protection of the sovereign, and he cited many passages from the books in which the protection of the law was referred to as the counterpart of the duty of allegiance. Upon this he based the argument that, since the protection of the law could not be given outside the realm to an alien, he could not outside the realm owe any duty. This argument in my opinion has no substance. In the first place reference is made as often to the protection of the Crown or sovereign or lord or government as to the protection of the law, sometimes also to protection of the Crown and the law. In the second place it is historically false to suppose that in olden days the alien within the realm looked to the law for protection except in so far as it was part of the law that the King could by the exercise of his prerogative protect him. It was to the King that the alien looked and to his dispensing power under the prerogative. It is not necessary to trace the gradual process by which the civic rights and duties of a resident alien became assimilated to those of the natural-born subject ; they have in fact been assimilated, but to this day there will be found some difference. It is sufficient to say that at the time when the common law established between sovereign lord and resident alien the reciprocal duties of protection and allegiance it was to the personal power of the sovereign rather than to the law of England that the alien looked. It is not, therefore, an answer to the sovereign's claim to fidelity from an alien without the realm who holds a British passport that there cannot be extended to him the protection of the law. What is this protection upon which the claim to fidelity is founded ? To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial

privileges. A well known writer on international law has said (see Oppenheim, *International Law*, 5th ed., vol. I., p. 546) that by a universally recognized customary rule of the law of nations every state holds the right of protection over its citizens abroad. This rule thus recognized may be asserted by the holder of a passport which is for him the outward title of his rights. It is true that the measure in which the state will exercise its right lies in its discretion. But with the issue of the passport the first step is taken. Armed with that document the holder may demand from the State's representatives abroad and from the officials of foreign governments that he be treated as a British subject, and even in the territory of a hostile state may claim the intervention of the protecting power. I should make it clear that it is no part of the case for the Crown that the appellant is debarred from alleging that he is not a British subject. The contention is a different one; it is that by the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity. In these circumstances I am clearly of opinion that so long as he holds the passport he is within the meaning of the statute a man who, if he is adherent to the King's enemies in the realm or elsewhere commits an act of treason. There is one other aspect of this part of the case with which I must deal. It is said that there is nothing to prevent an alien from withdrawing from his allegiance when he leaves the realm. I do not dissent from this as a general proposition. It is possible that he may do so even though he has obtained a passport. But that is a hypothetical case. Here there was no suggestion that the appellant had surrendered his passport or taken any other overt step to withdraw from his allegiance, unless indeed reliance is placed on the act of treason itself as a withdrawal. That in my opinion he cannot do. For such an act is not inconsistent with his still availing himself of the passport in other countries than Germany and possibly even in Germany itself. It is not to be assumed that the British authorities could immediately advise their representatives abroad or other foreign governments that the appellant, though the holder of a British passport, was not entitled to the protection that it appeared to afford. Moreover the special value to the enemy of the appellant's services as a broadcaster was that he could be represented as speaking as a British subject and his German work book showed that it was in this character that he was

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H. L. (E.) employed, for which his passport was doubtless accepted as the voucher.

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The second point of appeal (the first in formal order) was that in any case no English court has jurisdiction to try an alien for a crime committed abroad and your Lordships heard an exhaustive argument upon the construction of penal statutes. There is, I think, a short answer to this point. The statute in question deals with the crime of treason committed within or, as was held in *R. v. Casement* (1), without the realm: it is general in its terms and I see no reason for limiting its scope except in the way that I indicated earlier in this opinion, viz. : that, since it is declaratory of the crime of treason, it can apply only to those who are capable of committing that crime. No principle of comity demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm should be amenable to its laws. I share to the full the difficulty experienced by the Court of Criminal Appeal in understanding the grounds upon which this submission is based, so soon as it has been held that an alien can commit, and that the appellant did commit, a treasonable act outside the realm. I concur in the conclusion and reasons of that court upon this point.

Finally (and these are the third and fourth grounds of appeal to the Court of Criminal Appeal) it was urged on behalf of the appellant that there was no evidence that the renewal of his passport afforded him or was capable of affording him any protection or that he ever availed himself or had any intention of availing himself of any such protection, and if there was any such evidence the issue was one for the jury and the learned judge failed to direct them thereon. Upon these points too, which are eminently matters for the Court of Criminal Appeal, I agree with the observations of that court. The document speaks for itself. It was capable of affording the appellant protection. He applied for it and obtained it, and it was available for his use. Before this House the argument took a slightly different turn. For it was urged that there was no direct evidence that the passport at any material time remained in the physical possession of the appellant and that upon this matter the jury had not been properly directed by the learned judge in that he assumed to determine as a matter of law a

question of fact which it was for them to determine. This point does not in this form at least appear to have been taken before the Court of Criminal Appeal and your Lordships have not the advantage of knowing the views of the experienced judges of that court upon it. Nor, though the importance of keeping separate the several functions of judge and jury in a criminal trial is unquestionable, can I think that this is a question with which your Lordships would have had to deal in this case, if no other issue had been involved. For it is clear that here no question of principle is involved. The narrow point appears to be whether in the course of this protracted and undeniably difficult case the learned judge removed from the jury and himself decided a question of fact which it was for them to decide. This is a matter which can only be determined by a close scrutiny of the whole of the proceedings. My Lords, this is a task which in the circumstances of this case your Lordships have thought fit to undertake. I do not propose to examine in detail the course of the trial and the summing up of the learned judge, though I may perhaps be permitted to say that it was distinguished by conspicuous care and ability on his part. But having read the whole of the proceedings I have come to the clear conclusion that the learned judge's summing up is not open to the charge of misdirection. It may well be that there are passages in it which are open to criticism. But the summing up must be viewed as a whole and upon this view of it I am satisfied that the jury cannot have failed to appreciate and did appreciate that it was for them to consider whether the passport remained at all material times in the possession of the appellant. Upon this question no evidence could be given by the Crown and for obvious reasons no evidence was given by the appellant. It has not been suggested that the inference could not fairly be drawn from the proved facts if the jury thought fit to draw it and I think that they understood this and did draw the inference when they returned the general verdict of "Guilty." This point therefore also fails.

My Lords, I am asked by my noble and learned friend Lord Simonds to say that he concurs in the opinion which I have just read.

LORD MACMILLAN. My Lords, I have had the advantage of reading in print the opinion which has just been delivered by the Lord Chancellor. I am in entire agreement with it.

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LORD WRIGHT. My Lords, I also have had the same advantage. I fully agree with, and concur in, the opinion which has just been delivered by the Lord Chancellor.

LORD PORTER. My Lords, I have already stated that I agree with your Lordships in thinking that the renewal of William Joyce's passport, obtained on August 24, 1939, was evidence from which a jury might have inferred that he retained that document for use on and after September 18, 1939, when he was proved first to have adhered to the enemy, and therefore I can deal with this part of his appeal very shortly. "It is undisputed law that a British subject always, and an alien whilst resident in this country, owe allegiance to the British Crown and therefore can be guilty of treason. The question, however, remains whether an alien who has been resident here, but leaves this country, can whilst abroad, commit an act of treason. The allegiance which he owes whilst resident in this country is recognized in authoritative text books and the relevant cases to be owed because, as Hale (Pleas of the Crown, 1800 ed., vol. I., p. 58) says, "the subject hath his protection "from the King and his laws." If then he has protection he owes allegiance, but the quality of the protection required has still to be determined. On behalf of the appellant it was strenuously contended that unless the alien was enjoying the protection of British law he owed no allegiance. My Lords, I think that this is to narrow the obligation too much. Historically the protection of the Crown through its dispensing power was afforded to the alien in this country earlier than the legal protection which came later. Therefore any protection, whether legal or administrative, would in my view be enough to require a corresponding duty of allegiance.

It was said in the second place, however, that in no case could an alien, however long he had been resident here, commit an act of treason whilst he was abroad. This argument again seems to me to limit unduly the extent of his obligation. It is in contradiction of the resolution of the judges in 1707, whereby it was declared that if an alien who has been resident here goes abroad himself but leaves his family and effects here under the same protection, the duty (i.e. of allegiance) still continues. This resolution has been criticized as being merely the opinion of the judges in consultation with prosecuting counsel, and not given as a decision in any case. The criticism is true, but the resolution has been repeated in text book after text book of high

authority, and though not authoritative as a legal decision, it still has the weight of its repetition by great lawyers and the fact that it is nowhere challenged. Foster, East, Hawkins, Chitty and Bacon all set it out. Blackstone alone omits it, but Blackstone was giving a general view of the laws of England, and an omission to set out a particular extension of the general rule is not necessarily a denial of its existence. Equally the fact that many cases also state only the general rule in cases where no more is required is not a denial of the existence of certain modifications or extensions of it. It is true that even in the case with which the resolution deals the alien, though absent himself, is vicariously protected by the laws of this country in the person of his family and effects, but it is still no more than protection. Does then the possession of a passport afford any such protection as that contemplated by the rule? I think it does. Even after war is declared, some protection could be afforded to holders of British passports through the protecting power, and again it would be useful and afford protection in neutral countries. "It will be well to consider what a passport really is," says Lord Alverstone C.J., in *R. v. Brailsford* (1). "It is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries," and the late Sir William Malkin in vol. 49 of the *Law Quarterly Review*, p. 493, speaks of "the extensive though perhaps somewhat ill-defined, branch of international law which may be called . . . 'the diplomatic protection of citizens abroad'."

It must be remembered that the matter to be determined is not whether the appellant took upon himself a new allegiance, but whether he continued an allegiance which he had owed for some twenty-four years, and a lesser amount of evidence may be required in the latter than the former case. I cannot think that such a resident can in war time pass to and fro from this country to a foreign jurisdiction and be permitted by our laws to adhere to the enemy there without being amenable to the law of treason. I agree with your Lordships also in thinking that if an alien is under British protection he occupies the same position when abroad as he would occupy if he were a British subject. Each of them owes allegiance, and in so doing each is

(1) [1905] 2 K. B. 730, 745.

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subject to the jurisdiction of the British Crown. "The law of 'nations,' says Oppenheim, *International Law*, vol. I., p. 266 (5th ed.), "does not prevent a state from exercising jurisdiction "within its own territory over its subjects travelling or residing "abroad, since they remain under its personal supremacy." Moreover, in *R. v. Casement* (1), the point was directly decided in the case of a British subject who committed the act of adhering to the King's enemies abroad, and the decision was not seriously controverted before your Lordships. But my Lords, though the renewing of a passport might in a proper case lead to the conclusion that the possessor, though absent from the country, continued to owe allegiance to the British Crown, yet in my view the question whether that duty was still in existence depends upon the circumstances of the individual case and is a matter for the jury to determine. In the present case, as I understand him, the learned judge ruled that in law the duty of allegiance continued until the protection given by the passport came to an end—i.e. in a year's time—or at any rate until after the first act of adhering to the enemy, which I take to be the date of the appellant's employment as broadcaster by the German State on September 18, 1939. The Court of Criminal Appeal take, I think, the same view, but since your Lordships, as I understand, think otherwise, I must set out the facts as I see them. The appellant, admittedly an American subject, but resident within this realm for some twenty-four years, applied for and obtained a passport, as a British subject, in 1933. This document continued to be effective for five years, and was renewed in 1938 and again on August 24, 1939. Extensions are normally granted for one year, and that given to the appellant followed the normal course. It would, I think, not be an unnatural inference that he used it in leaving England and entering Germany, but in fact nothing further was proved as to the appellant's movements, save that his appointment as broadcaster by the German State, dated September 18, 1939, was found in his possession when he was captured, and that at any rate by December 10, he had given his first broadcast. Nothing is known as to the passport after its issue, and it has not since been found.

My Lords, for the purpose of establishing what the learned judge's ruling was, I think it necessary to quote his own words to the representatives of the Crown and of the prisoner before they addressed the jury. They are as follows (2): "I shall direct

(1) [1917] 1 K. B. 98.

(2) Notable British Trials, Trial of William Joyce, p. 204.

"the jury on count 3" (the only material count) "that on August 24, 1939, when the passport was applied for, the prisoner beyond a shadow of doubt owed allegiance to the Crown of this country and that on the evidence given, if they accept it, nothing happened at the material time thereafter to put an end to the allegiance that he then owed. It will remain for the jury, and for the jury alone, as to whether or not at the relevant dates he adhered to the King's enemies with intent to assist the King's enemies. If both or either of you desire to address the jury on that issue, of course, now is your opportunity." After that ruling both counsel proceeded to address the jury, the defence submitting that the appellant had not adhered to the King's enemies, the Attorney-General that he had. No other topic was touched upon by either of them, and in particular no argument was addressed to the question whether the appellant still had the passport in his possession and retained it for use or whether he still owed allegiance to the British Crown.

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After counsel's address to the jury the learned judge summed up, and again I think I must quote some passages from his observations. One such is (1): "Under that count [i.e. count 3] there are two matters which have got to be established by the prosecution . . . beyond all reasonable doubt . . . The first thing that the prosecution have to establish is that at the material time the prisoner, William Joyce, was a person owing allegiance to our Lord the King. Now, in my view, I have already intimated . . . the conclusion that I have reached as a matter of law is, if you as a jury accept the facts which have been proved in this case beyond contradiction—of course you are entitled to disbelieve anything if you wish—if you accept the facts which have been proved and not denied in this case, then at the time in question, as a matter of law, this man William Joyce did owe allegiance to our Lord the King, notwithstanding the fact that he was not a British subject at the material time. Now, members of the jury, although that is a matter for me entirely and not for you, I think it will be convenient if I explain quite shortly the reasons by which I have arrived at that view, partly for your assistance, explanation, and perhaps for consideration hereafter in the event of this case possibly going to a higher court." Again, he says (2): "None the less I think it is the law that if a

(1) Notable British Trials, Trial
of William Joyce, pp. 214, 215.

(2) Ibid. 217.

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“ man who owes allegiance by having made his home here,
 “ having come to live here permanently, thereby acquiring
 “ allegiance, as he undoubtedly does, if he then steps out of this
 “ realm armed with the protection which is normally afforded
 “ to a British subject—improperly obtained, it may be, but none
 “ the less obtained—. . . using and availing himself of the
 “ protection of the Crown in an executive capacity which covers
 “ him while he is abroad, then in my view he has not thereby
 “ divested himself of the allegiance which he already owed.”
 Later, he says (1) : “ So between August 24 and September 18,
 “ 1939, armed with a British passport, he had somehow or
 “ another entered Germany. Now, members of the jury, there-
 “ after up until the 2nd July, 1940, when his passport ran out, he
 “ remained under such protection as that passport could afford
 “ him during his stay in Europe.” Once again, he says (2) :
 “ I do not think that I am in any way ex-
 “ tending the principles of the law in saying that a man who
 “ in this way adopts and uses the protection of the sovereign
 “ to whom he has already acquired an allegiance remains under
 “ that allegiance and is guilty of treason if he adheres to the
 “ King’s enemies. Members of the jury, I accordingly pass from
 “ that aspect of the matter ; that is my responsibility. I may be
 “ wrong ; if I am I can be corrected. My duty is to tell you what
 “ I believe to be the law on the subject and that you have to
 “ accept from me, provided you believe those facts about the
 “ passport, going abroad and so forth. If you do not believe
 “ that you are entitled to reject it and say so, because you are
 “ not bound to believe everything, but if you accept the
 “ uncontradicted evidence that has been given, then in my view
 “ that shows that this man at the material time owed allegiance
 “ to the British Crown. Now, if that is so, then the matter
 “ passes into your hands, and from now onwards
 “ I am dealing with matters which are your con-
 “ cern and your concern alone, with which I have got
 “ nothing to do ; they are matters of fact, and the onus
 “ of proving those facts is upon the prosecution from first to
 “ last, and it never shifts. Now what have they got
 “ to prove ? They have got to prove that during
 “ this period, as I have already indicated, this man
 “ adhered to the King’s enemies without the realm, namely, in
 “ Germany.” The learned judge then refers to a broadcast, of

(1) Notable British Trials, Trial
 of William Joyce, p. 219.

(2) Ibid. 222, 223.

which there was uncontradicted evidence that it had been made before December 10, 1939, to the prisoner's engagement as a German broadcaster to Britain, and to the prisoner's statement which was put in evidence by the Crown and from which I need only quote the words: "Realizing, however, that at this critical juncture I had declined to serve Britain, I drew the logical conclusion that I should have no moral right to return to that country of my own free will and that it would be best to apply for German citizenship and make my permanent home in Germany." After reading the statement the learned judge added (1): "I think that is the whole of the very short material upon which you have to come to the conclusion as to whether or not it is proved to your satisfaction beyond all reasonable doubt that during the period in question this man adhered to the King's enemies, comforted and aided them with intent to assist them, and that he did so voluntarily. Those are the matters which you have to consider."

My Lords, I have read and re-read the summing up as a whole and I think I have quoted all the material passages from it. Whether I pay regard to its general import or confine myself to the particular passages set out above, I cannot read the words of the learned judge as doing other than ruling that in law the appellant continued to owe allegiance to His Majesty on September 18, 1939, on December 10, 1939, and indeed until July 2, 1940, and leaving to the jury only the question whether during this period the appellant adhered to the King's enemies. The passage in the summing up containing the words "proved you believe those facts about the passport, going abroad and so forth" in my opinion merely instructed the jury that they had to be satisfied that the accused man did obtain a renewal of his passport, did go abroad, and did make a statement, but that if they were so satisfied, then in law the prisoner continued to owe allegiance at all material times after he left this country. If it means more than this, I should regard it as a totally inadequate direction as to what must be proved in order to show that the allegiance continued after he left this country. But I do not think it does mean more than I have indicated. As I have stated, the renewal of the passport on August 24, 1939, was, in my view, evidence from which a jury might infer the continuance of the duty of allegiance. What the prosecution have to show is that that duty continued at least

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(1) Notable British Trials, Trial of William Joyce, p. 225.

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until September 18. The learned judge, as I see it, regards the renewal as proving conclusively that the duty continued until the passport ceased to be valid, unless some action on the part of the Crown or the appellant was proved which would put an end to its protection. The Court of Criminal Appeal, in my opinion, took the same view. Their words are (1) : " We have " to look at the evidence in this case, and upon that evidence to " decide whether the trial judge was right or wrong in holding " as a matter of law that on September 18, 1939, and between " that date and July 2, 1940, this appellant did owe allegiance " to the King. We agree with Tucker J. that the proper way " of approaching that question is to see whether anything had " happened between August 24 and September 18 to divest the " appellant of that duty of allegiance which he unquestionably " owed at the earlier of those dates." This ruling, as I see it, can only mean that the appellant's duty of allegiance remained in force until July 2, 1940, unless it was shown by him or on his behalf that something had occurred to put an end to that duty. It puts the onus on him to show some action terminating that obligation. The passport was never found again, and he may have used it only to gain admittance to Germany and may then have discarded it. Indeed, his statement, if believed, indicates that this was his object, and the mere fact that the renewal was for a year proves nothing, since, as was proved in evidence, that is the normal period of extension. There is no evidence that he kept it for use on or after September 18. If I thought that the obtaining of the passport on July 2 proved in law that the appellant retained it for use at least until September 18, unless he was shown to have withdrawn his allegiance, I should accept this ruling. But I do not think it correct. It could only be supported on the ground that allegiance continues until the appellant shows that it is terminated. The Attorney-General supported this contention by a reference to Archbold's Criminal Practice (31st ed.) (1943), p. 330, where it is stated that if a matter be within the knowledge of the accused and unknown to the Crown the onus of proof is cast upon the former. For this proposition the case of *R. v. Turner* (2), is said to be an authority. But that case has been explained as dependent upon the special provisions of the game laws and as being, therefore, not of general application. The true principle is, I think, set out in Phipson on Evidence (8th ed.), p. 34, and Best on Evidence (12th ed.), p. 252, and is

(1) (1945) 173 L. T. 377, 382.

(2) (1816) 5 M. & S. 206.

explained by Holroyd J. (himself a party to the judgment in *R. v. Turner* (1)), in *R. v. Burdett* (2): The rule in question, he says, "is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given it is a rule to be applied in considering the weight of evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true." If this be the true principle, the failure of the prisoner to give evidence as to his dealing with the passport goes to increase the weight of the evidence against him, but does not make the evidence of his applying for and receiving it proof conclusive in law that he continued to retain it for use or at all. That he received it may be some proof to go to the jury that he retained it, but it is no more; it is not a matter upon which a court is entitled to rule that a jury must draw the inference that he retained his allegiance. Indeed at one point in his argument the Attorney-General used language which, in my view, accepted this as the true principle when he said: "I put the passport merely as evidence of the existence of protection. If he" (i.e., the accused) "discarded it on his return that might make a difference." To this observation I would merely add that the renewal of the passport was at best but some evidence from which a jury might infer that the duty of allegiance was still in existence. Unless, however, the accused man continued to retain it for use as a potential protection, the duty of allegiance would cease, and it was for the jury to pronounce upon this matter.

I do not understand your Lordships to rely upon the proviso to s. 4 of the Criminal Appeal Act, nor do I think it could be said that no substantial miscarriage of justice had occurred, if I am right in considering that the matter should have been left to the jury. The test has been laid down by your Lordships' House to be whether a reasonable jury properly directed must have come to the same conclusion. In the present case a reasonable jury properly directed might have considered that the allegiance had been terminated. Against the mere receipt of the passport there must be set the fact that its possession was at least desirable if not necessary to enable the accused man to proceed to Germany from this country, the fact that it was not

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(1) (1816) 5 M. & S. 206.

(2) (1820) 4 B. & Ald. 95, 140.

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found in his possession again nor anything further known of it, his statement as to his intention of becoming naturalized in Germany and his acceptance of a post from the German State. At any rate these were matters for a jury properly directed to consider. They were not directed on them and, as I have stated in my view they were told that the matter was one of law and not for them.

My Lords, the question of the extent to which an alien long resident in this country continues to owe allegiance after he has left it and whether the request for an acceptance of a passport makes the duty of allegiance still owed until the protection of that passport ceases by effluxion of time or at least for some period after its issue is, and has been certified to be, a point of law of exceptional public importance. One matter to be decided in solving that question is the boundary line between the functions of a judge and those of a jury. Apart from this, the principle that questions which are rightly for the jury should be left to them and that a proper direction should be given is, as I think, also of great public importance. The one matter concerns this country only in the exigencies of war, though then no doubt it is of vital importance: the other is a necessary element in the true administration of the law in all times of peace and war. If the safety of the realm in war time requires action outside the ordinary rule of law, it can be secured by appropriate measures such as a Defence of the Realm Act, but the protection of subject or foreigner afforded through trial by jury and the due submission to the jury of matters proper for their consideration is important always, but never more important than when the charge of treason is in question. For these reasons I would myself have allowed the appeal.

Appeal dismissed.

Solicitors for appellant : *Ludlow & Co.*

Solicitor for the Crown : *Director of Public Prosecutions.*

[PRIVY COUNCIL.]

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May 14.

DAJANI AND OTHERS APPELLANTS ;

AND

MUSTAFA EL KHALDI (SINCE DECEASED)

AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Waqf—Validity—Compliance with statutory provisions—Registration—Jurisdiction of civil courts—Palestine Order in Council, 1922, s. 52—Civil and Religious Courts (Jurisdiction) Ordinance, Laws of Palestine, 1933, c. 18, s. 5—Land Transfer Ordinance, Laws of Palestine, 1933, c. 81, s. 4.

A Moslem woman, wishing to dedicate as waqf certain property registered in her name and her share in properties inherited by her from her brother and her sister by virtue of two certificates of succession issued by the Shariah Court, Jerusalem, appeared before that court and executed a wakfieh under which the appellants were appointed mutwallis. A judgment was given in the Shariah Court for the validity of the waqf, which was registered in that court. Every requisite step was then taken to have the waqf registered in the land registry, but, owing to delay in the registry itself, that had not been effected when the dedicator died. Thereupon the respondents, alleging that there had been a failure to comply with certain of the provisions of the Land Transfer Ordinance, and that therefore there had been no valid dedication of the lands, claimed the properties as heirs and applied to be registered in the land registry as owners.

Held, first, that the civil courts had jurisdiction to hear and determine the matter. The right of the parties to the ownership of the disputed properties was not a matter of succession, but depended on a transfer by way of waqf, and accordingly the provisions of the Palestine Order in Council, 1922, which conferred exclusive jurisdiction on the Moslem religious courts in matters of personal status, which included succession, were inapplicable. Further, by virtue of s. 52 of the Order in Council of 1922 the jurisdiction of the Moslem religious courts was subject to the provisions of "any Ordinance" and, therefore, subject to s. 5 of the Civil and Religious Courts (Jurisdiction) Ordinance, which provided that "Every action or other proceeding concerning the "ownership or possession of immovable property shall be decided "by a civil court notwithstanding any claim by any party or person "that the land is waqf."

Held, secondly, that the provisions of the Land Transfer Ordinance had been sufficiently complied with. The word "first" in sub-s. 2 of s. 4 of that Ordinance, which required that "any

* *Present* : LORD PORTER, LORD DU PARCQ and SIR JOHN BEAUMONT.

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“ person wishing to make a disposition of immovable property “ shall first obtain the written consent ” of the Director of Lands, is not to be taken as meaning “ before the dedication,” but as conveying that the consent must be given before the disposition becomes effective. Further, the necessity of obtaining the written consent of the Director does not require that the consent should be communicated to the petitioner : it is required by the registrar of lands as his authority for the transfer, not by the transferee as part of his title.

Held, lastly, that, the dedicator having taken every requisite step to complete the voluntary transfer and only having failed to obtain the necessary registration owing to unavoidable delay in the registry, and no further order of the court being required to enable the appellants’ title to be completed, the fact that the dedicator had died before registration could take place did not prevent the disposition being a valid one, capable of being registered after her death.

Lababidi v. Ma'mour Awqaf (1942) 9 P. L. R. 608, *El Muwaqqet v. El Turk* (1943) 10 P. L. R. 159, and *Abdul Jaber v. Qadi of the Shari'a Court, Jenin* (1943) 10 P. L. R. 552, referred to.

Order of the Supreme Court of Palestine (1943) 10 P. L. R. 646, reversed.

APPEAL (No. 52 of 1944) from a decree and order of the Supreme Court of Palestine sitting as a Court of Appeal (December 22, 1943) reversing a judgment of the Land Court of Jerusalem (July 8, 1943).

The question in this appeal was whether certain lands in Palestine were validly dedicated by their owner as waqf or whether there was no valid dedication and the lands passed to the heirs of the owner. The following facts are taken from the judgment of the Judicial Committee : On April 1, 1942, one Sitt Amineh Khaldi sent an extract from the register containing a list of the properties she wished to dedicate to the Qadi of Jerusalem accompanied by a letter of which the material terms were :—

“ To his Honour, the Qadi, Shariah Court, Jerusalem.

“ Applicant : Amineh daughter of the late Bader Effendi el Khaldi of Jerusalem.

“ Application : I own personally and by way of inheritance “ from my late brother Sheikh Khalil Effendi el Khaldi and “ my late sister Nafiseh el Khaldi the properties situated in “ Jerusalem as specified in a list registered in the Tabu Department of Jerusalem. I desire to dedicate as waqf what I am “ entitled to in the said properties under conditions which I “ shall prescribe before your Honour. Will you please do me “ the favour to come to my house situated near the Shariah

" Court for registration of this waqf as I am a veiled Moslem woman."

That letter was forwarded by the Qadi on the same day to the registrar of lands: he said :—" I beg to forward to you " a schedule which was submitted to me by Amineh Bint " Bader Eff el Khaldi requesting registration as waqf of the " property registered in her name and her share in the proper- " ties inherited by her from her brother Esh Sheikh Khalil " Eff and her sister Sitt Nafiseh, by virtue of two certificates of " succession issued by this court. Please say whether there is " any objection for registration of the waqf or not." Again on the same day the registrar of lands replied to the Qadi saying :—" On searching the registers it appears that the raqaba " (ownership) of the properties shown in the Tabu extract " attached to your letter is mulk property," (i.e., freehold) " and there is no objection to its being made a waqf " accordingly."

On receiving that reply the Qadi proceeded on April 4 to the house of Sitt Amineh and there held a Shariah meeting at which the lady dedicated the properties in question to the waqf in the terms which were to be found in a wakfieh or deed of dedication of that date. From that document it appeared that not only had an extract from the land register been sent to the registrar on April 1, but that a copy of the title deeds had also been furnished at the same time. Under the terms of the wakfieh the present appellants were appointed mutwallis, and the proceedings of the Shariah meeting terminated with the usual fictitious lawsuit by which dedication was effected and the transfer made irrevocable so far as the Shariah court was concerned. On April 15 the Qadi wrote again to the registrar of lands stating that a judgment had been given in the Shariah court for the validity of the waqf, enclosing the wakfieh, and stating that the lady was taking all the necessary legal and official measures for the registration of the waqf in the land registry. The necessary petition fees were paid by the appellant Mamdouh El Khaldi, one of the mutwallis, on April 16, and on April 22 he wrote to the registrar of lands pointing out that the wakfieh which had been sent by the Qadi had been registered in the Shariah Court, was accompanied by a schedule of properties and by two certificates of succession (namely, those proving Sitt Amineh's succession from her brother and sister) and requesting that the properties might be registered as waqf.

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Two days later the mutwalli, having discovered that two of the properties dedicated had been mortgaged, sent a further letter setting out that fact, but asking that as the rights of the mortgagees had been reserved by the wakfieh, the mortgaged properties might be registered as waqf in the land registry. On April 27, the registrar of lands sent on the file to the Director of Land Registration and inquired whether the transaction of the constitution of the waqf might be proceeded with in accordance with the wakfieh as requested by the applicant Sitt Amineh. The Director replied to the registrar on June 4 authorizing the constitution of the waqf in respect of the properties not mortgaged, but requiring with regard to the mortgaged properties that no action be taken until the existing mortgage should be discharged. Apparently, some time after that note was dispatched the applicant, or someone on her behalf, either saw or wrote to the Director with the result that he wrote to the registrar on September 16, stating that the applicant was insisting on the registration of the wakfieh on the properties which were mortgaged. The letter proceeded—
 “ She desires therefore to register the wakfieh, subject to the
 “ aforesaid mortgage. I have reconsidered the case and will
 “ have no objection to the registration of the waqf on the
 “ mortgaged properties provided a note is inserted against
 “ those entries that this waqf will take effect only subsequent
 “ to the mortgage being released, as stated in the wakfieh.”

The steps necessary for registration had proceeded no further when the lady died, but before that time the land had been officially valued in order that the fees payable might be ascertained. The mutwallis had always been prepared to make the requisite payment but since no information as to the amount of the valuation had been given to them until December, 1942, they were unable to tender the fees before that date. The registrar kept those fees in deposit when they were tendered but did not accept them as payment of the sum due. Immediately after the lady's death those then representing the respondents claimed the property as her heirs, applied to be registered in the land registry as owners, brought this action in the Land Court claiming that the land should be registered in their names and applied for an injunction to restrain the appellants from taking any step to register the lands in the name of a waqf. Meanwhile, the appellants had entered into possession of the property, had received the rents and profits, paid the interest on the mortgages and, it seems, sold some of the lands.

In those circumstances an interim injunction was granted until the trial of the action but, on the hearing the action was dismissed, and the injunction discharged. An appeal, however, to the Supreme Court (Gordon Smith C.J. and Edwards J.), was allowed, the judgment of the Land Court reversed and the properties in dispute ordered to be registered in equal shares in the names of the respondents. It was from that judgment that this appeal to His Majesty in Council was preferred.

By s. 52 of the Palestine Order in Council, 1922, "Moslem religious courts shall have exclusive jurisdiction in matters of personal status . . .," and in s. 51 of the Order in Council "matters of personal status" are said to include "successions."

By s. 4 of the Land Transfer Ordinance, Laws of Palestine, 1933, c. 81: "(1.) No disposition of immovable property shall be valid until the provisions of this Ordinance have been complied with. (2.) Any person wishing to make a disposition of immovable property shall first obtain the written consent required by the next succeeding sub-section. (3.) In order to obtain the consent referred to in sub-s. 2, a petition shall be presented through the land registry office in which the land is situated to the Director setting out the terms of the disposition intended to be made and applying for his consent to the disposition. (4.) The petition shall be accompanied by proof of the title of the transferor and shall contain an application for registration of a deed to be executed for the purpose of carrying into effect the terms of the disposition."

1946. March 13, 14, 15. *Maurice Fitzgerald K.C.* and *Scott Henderson K.C.* for the appellants. Where land has been validly dedicated as waqf according to Shariah or Moslem law, and the dedicator has thereby deprived himself of all the property in it, the dedication is not void so that on his death his heirs can take the land by succession merely because the dedication has not been formally registered in the land registry as required by the civil law under the Palestine Land Transfer Ordinance. That cannot possibly be so in this case where the dedicator and the mutwallis took every necessary step during her lifetime to get the land registered as waqf in the land registry, and the only reason why it was not so registered was some unexplained delay on the part of the land department. The point is of importance not only to these particular parties, but to all Moslems in Palestine. The first submission is that the civil courts had no jurisdiction to entertain this case.

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Certain matters in relation to waqfs are to be dealt with only by religious courts in accordance with religious law : Palestine Order in Council, 1922, ss. 17, sub-s. 1 (c) ; 42, 46, 51 and 52 : the Palestine Mandate ; *Jerusalem-Jaffa District Governor v. Suleiman Murra* (1). This is a matter of waqf and of succession to the estate of a Moslem, and both of those matters are, under the Order in Council of 1922, within the exclusive jurisdiction of the competent religious court and the civil courts have no jurisdiction to deal with them : Palestine Order in Council, 1922, s. 52 ; Succession Ordinance, 1923, s. 6, sub-s. 1. It is submitted that s. 5 of the Civil and Religious Courts (Jurisdiction) Ordinance (c. 18 of the Laws of Palestine, 1933), which provides that every action concerning the ownership of immovable property " shall be decided by a civil court notwithstanding any claim by any party or person that the land " is waqf," does not apply where what is being dealt with is land which has been dedicated as waqf and the claim by the adverse party is by people whose only right exists as heirs of a deceased person and who are therefore claiming as a matter of succession. If that is not right, it is submitted that the Civil and Religious Courts (Jurisdiction) Ordinance is pro tanto ultra vires. Section 5 does not give the civil court jurisdiction to decide whether land which has been the subject of a judgment of the Shariah Court has been constituted a waqf. A provision of such an effect would be repugnant to art. 9 of the Mandate and s. 18 of the Order in Council of 1922. Therefore where a dispute arises whether land has passed to heirs the jurisdiction of the Shariah Court to decide whether land is waqf or not is not excluded when the dispute arises on succession. The wakfieh which was executed in April, 1942, was valid and irrevocable according to Shariah law, and the consequence of it being so irrevocable is a matter for the exclusive jurisdiction of the Shariah Court. [Reference was also made to *A Treatise on the Laws of Evqaf* by Omer Hilmi Efendi, 1899 ed., arts. 61, 64, 101 and 119.]

The dedicator, as required by s. 4 of the Land Transfer Ordinance, had obtained the consent of the Director of Lands and, before her death, had taken every step to ensure that the land was registered except one—the payment of the fees due on registration. The evidence is, however, that the mutwallis were always ready and willing to pay them, but that the land registry could not accept the payment of fees until they had

(1) [1926] A. C. 321, 326-7.

valued the land. The result was that when she died on November 9, 1942, the land had not been entered in the register as waqf. The correspondence of April 1, 1942, was sufficiently precise to show what the proposed transaction was and to what the consent was required, and the judge of the Land Court was right when he said that in the absence of proof to the contrary he was not prepared to say that the letter of April 1 from the registrar of lands to the Qadi was not the consent of the Director. Further, a petition as required by sub-s. 3 of s. 4 of the Land Transfer Ordinance is a request, and the letter of the dedicator of April 1 is plainly a request for consent. The applicant has therefore done everything that was necessary for registration, except the actual payment of the fees, and the waqf cannot be said to be null and void for lack of consent. In addition, it is not necessary that the consent should be communicated to the applicant for it to be a proper consent; it is sufficient if it has been sent to the official in charge of the local register.

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The provision in sub-s. 1 of s. 4 of the Land Transfer Ordinance that "no disposition of immovable property shall be "valid until the provisions of this Ordinance have been "complied with" is put in for the purpose of determining at what precise date a disposition becomes valid, but there is nothing in that Ordinance to suggest that because the disposition has not actually been registered at any time all rights of any of the parties to the proceeds of the disposition have been abrogated. [Reference was made to *Lababidi v. Ma'mour Awqaf* (1), *El Muwaqqet v. El Turk* (2) and *Patlacos v. Greek Orthodox Patriarchate* (3).] There is nothing in this legislation to prevent the mutwallis from proceeding to obtain the registration of this land, and the heirs in the circumstances of this case are not entitled to be registered as the owners of the land.

Scott Henderson K.C. followed and referred to *Gowan v. Wright* (4).

Sir Cyril Radcliffe K.C., *H. Goitein* and *Colin H. Pearson* for the respondents. This is not an action which contains a dispute about succession. The appellants—defendants in the action—are not claiming as successors. Their claim is that before the dedicator died she had validly by the law of Palestine transferred certain immovable property from herself to the mutwallis for the purpose of waqf. If they are right they took

(1) (1942) 9 P. L. R. 608.

(2) (1943) 10 P. L. R. 159.

(3) (1939) 6 P. L. R. 462.

(4) (1886) 18 Q. B. D. 201, 203.

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by virtue of a valid disposition inter vivos. The respondents are claiming that she did not validly make a disposition inter vivos of the land, and that therefore they, as heirs to her property, are entitled; they are challenging the effectiveness of that inter vivos disposition, and that is not a dispute about succession. The whole question, therefore, is what is the law of Palestine as laid down in the Land Transfer Ordinance as to the rights of the parties in this case? The only transaction by which it is said that she divested herself of the immovable property is the wakfieh of April 4, 1942. If that is not effective to dispose of the property under the Ordinance there is nothing else under which the mutwallis can claim. Unless a petition satisfying the requirements of sub-ss. 3 and 4 of s. 4 of the Land Transfer Ordinance is before the Director he is in no position to give his consent under the Statute. Reading the letter from the Qadi of the Shariah Court, which is said to have been the application, and the answer from the registrar, one cannot assume that they are an application for the consent of the Director. The first letter cannot be regarded as a petition as required by the Ordinance—it does not ask for the Director's consent, or set out the terms of the disposition, and it is not accompanied by proof of title. This really disposes of the case, and the alleged dedication of waqf was and is null and void by reason of the consent of the Director of Lands not having been obtained. Instructions to go ahead given inside the office are not the Director's statutory consent.

Next, assuming that there was a consent of the Director, and that for the purpose of the statute the consent could be given before or after the dedication—though it is submitted that it must be given before—what is the position where no registration in fact has taken place and the intending dedicator of the waqf died? The *Turk* case (1) said that after effective dedication of waqf there is nothing left in the dedicator in respect of immovable property which the heirs could inherit. It is submitted that that is wrong; the dedicator had something left which she could sell or mortgage before the waqf is registered. It is not enough to refer to the Shariah Court and say that this is an irrevocable waqf. [Reference was made to *Abdul Jaber v. Qadi of the Shari'a Court, Jenin* (2).] It is contended that the effect of the Land Transfer Ordinance is by its own terms to show that the effective transfer of an immovabe is effected by the transfer on the register and not by the

(1) 10 P. L. R. 159.

(2) 10 P. L. R. 552.

document. The execution of the document as provided for in the Ordinance is a necessary constituent of the transfer. If a contract has been made then there is an equity to have it specifically enforced. The trouble here is that there is no contract; there is nothing except the question whether the deed of April 4 is good or bad to dispose of the land. Therefore there is no equity outside the document of April 4. *Lababidi v. Ma'mour Awqaf* (1) does not help. If the determining element were to be equities said to exist in the mutwallis as against either the dedicator or those taking through her to complete the intending disposition, those can only be equities borrowed from English law, as provided by art. 46 of the Palestine Order in Council of 1922, and there is no such equity in favour of volunteers in English law. Private trusts do not exist in Palestine: *Eliash v. Director of Lands, Jerusalem* (2). In Palestine the execution of the instrument is not something which transfers land, it is the making of the entry in the register which does that, and therefore a person who dies without having made a valid disposition by getting the entry on the register completed has done nothing more than to make an ineffective disposition of land.

H. Goitein followed. In accordance with the law of Palestine property in immovables can only pass from one person to another either by disposition inter vivos or by succession on death. A disposition inter vivos involves two elements, (a) a contract, gift or other transaction, (b) a conveyance. The crucial point in the passing of property inter vivos is registration.

Maurice Fitzgerald K.C. replied. So long as consent is obtained at some stage there is no reason why it should not be obtained either before or after the wakfieh is drawn up. There is nothing in the Ordinance to show that it must be obtained before. It was said that if the dedicator died before entry in the register the whole transaction came to an end and the dedication was null and void, but that is not what the Ordinance says.

May 14. The judgment of their Lordships was delivered by LORD PORTER. This is an appeal from a decree and order dated December 22, 1943, of the Supreme Court of Palestine sitting as a Court of Appeal whereby a judgment dated July 8, 1943, of the Land Court of Jerusalem was reversed,

(1) 9 P. L. R. 608.

(2) (1920-33) P. L. R. 735.

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and whereby it was adjudged that those who then represented the respondents to this appeal be registered in the land registry of Jerusalem as owners of the lands in question in the appeal, and that the costs of the appeal to the Supreme Court be paid out of the estates. The question at issue is whether these lands were validly dedicated by their owner as a waqf so that on her death they passed to the mutwallis appointed by her as representatives of the waqf or whether there was no valid dedication and the lands passed to the heirs of the owner.

The lands in question are situated in Palestine, and the disposition of land in that country is governed by The Land Transfer Ordinance (Laws of Palestine, 1933, vol. 2, c. 81), the long title of which is "An Ordinance to provide for the registration of dispositions and transmissions of land." Its material terms are as follows :—Section 2 : " . . . ' Director ' means the Director of Lands ; ' disposition ' means a sale, mortgage, gift, dedication of waqf of every description, and any other disposition of immovable property, except a devise by will or a lease for a term not exceeding three years, and includes a transfer of mortgage and a lease containing an option by virtue of which the term may exceed three years." Section 3 : " This Ordinance shall apply to all immovable property the subject of the Ottoman Land Code dated 7 Ramadan, 1274, as well as to mulk land, all forms of waqf land and every other form of immovable property." Section 4 : " (1.) No disposition of immovable property shall be valid until the provisions of this Ordinance have been complied with. (2.) Any person wishing to make a disposition of immovable property shall first obtain the written consent required by the next succeeding sub-section. (3.) In order to obtain the consent referred to in sub-s. (2.), a petition shall be presented through the land registry office in which the land is situated to the Director setting out the terms of the disposition intended to be made and applying for his consent to the disposition. (4.) The petition shall be accompanied by proof of the title of the transferor and shall contain an application for registration of a deed to be executed for the purpose of carrying into effect the terms of the disposition. (5.) The petition may also include a clause fixing the damages to be paid by either party who refuses to complete the disposition if it is approved."

Section 7 : " After the title has been examined and the consent required by s. 4 has been obtained, a deed shall be

“executed in the form prescribed and shall be registered in the land registry :

“Provided that where a registered mortgage contains a covenant by the mortgagor not to lease the mortgaged property without the consent of the mortgagee, the Director shall refuse to register any lease by the mortgagor of the mortgaged property unless the written consent of the mortgagee is first lodged with the Director of Lands.”

Section 11 : “(1.) Every disposition to which the consent required by s. 4 has not been obtained shall be null and void : “Provided that any person who has paid money in respect of a disposition which is null and void may recover such money by action in the courts.”

Section 13 : “(1.) When any immovable property passes by operation of a will or by inheritance, the legatees or heirs, as the case may be, shall be jointly and severally responsible for the registration of the immovable property in the name of the legatees or heirs within a year of the death. (2.) The registration shall be made upon the certificate of a competent court stating that the person or persons requiring registration are entitled as legatees or heirs or upon a certificate signed by the mukhtar or imam and two notables.”

It was said by the respondents that the requirements of these sections had not been complied with, that the dedication of this land as waqf was not valid, but was null and void or, at any rate, as the transfer had not been effected at the date of the death of the transferor, the suggested transmission to the mutwallis was ineffective to pass the property. The property in dispute belonged before her death to Sitt Aminah Khaldi. The ownership of ten or eleven pieces of land is in issue and of these she was registered as part owner of three, whereas of the others she had inherited a share from her relatives Sheikh Khalil and Nafiseh and was entitled to obtain registration. The lady died on November 9, 1942. She was anxious before her death to make a settlement of her lands as a waqf and accordingly, having, it seems, approached the Qadi of the Shariah or religious court in Jerusalem, she made in his presence on April 4 of the same year a dedication of the lands in question as waqf. The respondents, however, maintain that such a dedication, though binding on the lady, does not constitute, or take effect as, a “disposition” of lands unless the provisions of the Land Transfer Ordinance are complied with, and they contend that those provisions have not been fulfilled. [His Lordship then

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stated the facts as set out above relevant for the consideration of the point at issue, and continued :] The first argument put forward before their Lordships on behalf of the appellants was that the matter was solely one for decision in the Shariah Court, had there been finally decided and was not within the jurisdiction of the Land Court. The contention was put in this way : The Palestine Mandate, it was said, provided that " Respect for the personal status of the various peoples and " communities and for their religious interests shall be fully " guaranteed. In particular the control and administration of " waqfs shall be exercised in accordance with religious law and " the dispositions of the founders." The Palestine Order in Council of 1922 was promulgated to carry out the mandate and provided :—" 17. (1.) (c) No Ordinance shall be promulgated " which shall be in any way repugnant to or inconsistent with " the provisions of the Mandate, and no Ordinance which " concerns matters dealt with specifically by the provisions of " the mandate shall be promulgated until a draft thereof has " been communicated to a Secretary of State and approved by " him, with or without amendment."

" 42. The High Commissioner may by order establish Land " Courts as may be required from time to time for the hearing " of such questions concerning the title to immovable property " as may be prescribed."

" 46. The jurisdiction of the Civil Courts shall be exercised " in conformity with the Ottoman Law in force in Palestine on " November 1, 1914, and such later Ottoman Laws as have been " or may be declared to be in force by public notice, and such " Orders-in-Council, Ordinances, and regulations as are in force " in Palestine at the date of the commencement of this Order, " or may hereafter be applied or enacted ; and subject thereto, " and so far as the same shall not extend or apply, shall " be exercised in conformity with the substance of the common " law, and the doctrines of equity in force in England, and with " the powers vested in and according to the procedure and " practice observed by or before Courts of Justice and Justices " of the Peace in England, according to their respective juris- " dictions and authorities at that date, save in so far as the said " powers, procedure, and practice may have been or may " hereafter be modified, amended, or replaced by any other " provisions. Provided always that the said common law and " doctrines of equity shall be in force in Palestine so far only as " the circumstances of Palestine and its inhabitants and the

“ limits of His Majesty’s jurisdiction permit and subject to
 “ such qualification as local circumstances render necessary.”

“ 51. Subject to the provisions of Arts. 64 to 67 inclusive,
 “ jurisdiction in matters of personal status shall be exercised in
 “ accordance with the provisions of this part by the courts of the
 “ religious communities established and exercising jurisdiction
 “ at the date of this Order. For the purpose of these provisions
 “ matters of personal status mean suits regarding marriage or
 “ divorce, alimony, maintenance, guardianship, legitimation
 “ and adoption of minors, inhibition from dealing with property
 “ of persons who are legally incompetent, successions, wills and
 “ legacies, and the administration of the property of absent
 “ persons.”

“ 52. Moslem religious courts shall have exclusive jurisdiction
 “ in matters of personal status of Moslems in accordance with
 “ the provisions of the law of procedure of the Moslem religious
 “ courts of October 25, 1333, A. H., as amended by any
 “ ordinance or rules. They shall also have, subject to the
 “ provisions of any ordinance or of the Order of December 20,
 “ 1921, establishing a Supreme Council for Moslem religious
 “ affairs, or of any Orders amending the same, exclusive juris-
 “ diction in cases of the constitution or internal administration
 “ of a waqf constituted for the benefit of Moslems before a
 “ Moslem religious court.

“ There shall be an appeal from the Court of the Qadi to the
 “ Moslem Religious Court of Appeal, whose decision shall be
 “ final.”

Relying on these provisions the appellants say that the rights
 of the parties to the ownership of the disputed properties is a
 matter of succession, succession is personal status and Moslem
 religious courts are given exclusive jurisdiction in such matters.
 They support their argument by referring to ss. 2, 3, sub-s. 1,
 s. 6, sub-s. 1, and s. 25, sub-s. 1, of the Succession Ordinance
 (Laws of Palestine, 1933, vol. 2, c. 135), which are in the follow-
 ing terms:—“ 2. In this Ordinance, unless the context
 “ otherwise requires—‘ civil court ’ means a court established
 “ by, and sitting under the authority of, the Government of
 “ Palestine, but does not include a religious court ;
 “ 3. (1.) The civil courts shall have exclusive jurisdiction in all
 “ matters relating to the succession to, and the confirmation
 “ of wills of, every Palestinian citizen and any other person,
 “ not being a foreigner : Provided that such citizen or other
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“ member of one of the religious communities. 6. (1.) The
 “ Moslem religious courts shall have exclusive jurisdiction as to
 “ all matters relating to succession upon death to the estate
 “ of a Moslem, whether under a will or otherwise. 25. (1.) Any
 “ person claiming to be entitled to any share in immovable
 “ property forming part of a succession may apply to the Direc-
 “ tor of Lands to enter his name upon the register in respect of
 “ his interest, and such entry shall be made accordingly upon
 “ payment of the prescribed fees and upon production to the
 “ Director—

“ (i.) where the deceased was a Moslem, of an ilam sharia from
 “ the competent religious court ;

“ (ii.) in any other case—

“ (a) of an order of the president of the competent district
 “ court in any case in which there has been registered at the
 “ land registry a memorandum of an order under s. 9,
 “ sub-s. 2, or the probate of a will ;

“ (b) of an order of the president of the competent district
 “ court in any case in which the deceased was a foreigner as to
 “ whose succession no order to refer has been made in pursu-
 “ ance of s. 5, and in any case in which the deceased was not,
 “ at the time of his death, a member of one of the religious
 “ communities ;

“ (c) of an order of the competent court of the community
 “ of which the deceased was a member at the date of his
 “ death in any case not falling within paras. (a) or (b).”

Though this question was fully argued before the Board, it is doubtful if it was persisted in before the Supreme Court. But, however this may be, in their Lordships' view it must fail. In their opinion no question arises here of succession. Admittedly the respondents are Sitt Amineh's successors. Indeed, they have been so declared by a certificate of the Shariah Court dated November 23, 1942. It is true that that certificate limits the succession to those lands which were not dedicated as waqf, but the ownership of the dedicated lands is not a question of succession. It depends on a transfer by way of waqf purported to be made by the lady in her lifetime and is no more a succession than would be a dispute between the mutwallis of a waqf who claim that their title prevails over that of a purchaser from a former owner. The lady's death is but an incident, not the foundation of the mutwallis' title. Their title is the dedication, not the death. But even if the matter

were not otherwise plain, it is to be observed that s. 52 of the Order in Council makes the jurisdiction of the Moslem religious courts subject to the provisions of any Ordinance, and s. 5 of the Civil and Religious Courts (Jurisdiction) Ordinance (Laws of Palestine, 1933, c. 18) declares that "Every action or other proceeding concerning the ownership or possession of immovable property shall be decided by a civil court notwithstanding any claim by any party or person that the land is waqf." Their Lordships entertain no doubt that the civil courts had jurisdiction to hear and determine the matter.

Secondly, however, it was said that the land had been solemnly dedicated, that the lady had taken, or had had taken on her behalf, all steps that were possible to perfect the transfer and that the delay in registration, which was not her fault, was not a bar to the appellant's claim. In answer, the respondents relied on the Land Transfer Ordinance, alleged that its terms had not been complied with and said that the gift of the land had never been perfected. It is not disputed that the Ordinance applies to any case where the Land Court has jurisdiction nor that the dedication of a waqf is a disposition. Accordingly, it is argued that the provisions of the Ordinance have not been complied with in that (1.) the written consent of the Director of Lands was never obtained and, in any case, was not obtained *first*, i.e., before the disposition was made; (2.) that no petition was presented and, in particular, no petition setting out the terms of the disposition; (3.) that no proof of title was sent; and (4.) that the disposition was therefore invalid under s. 4, sub-s. 1, and null and void under s. 11.

Their Lordships are not prepared to accede to these arguments. They do not consider that the letter of April 1, amounts to a petition within the terms of the Ordinance, or that the answer of the registrar of lands amounts to a consent. They are, however, of opinion that the three letters of April 1, 15 and 22 are a sufficient compliance. Having regard to the tenor of the correspondence they can have no doubt that the application was made on behalf of the lady. No particular form of petition is required, the wakfieh deed was sent and contained all the terms of the disposition, the land had been identified and, apparently, two certificates of succession were sent dealing with the property which had passed to Sitt Amineh from her brother and sister. It is true that one of the certificates printed in the record is of later date than this letter, but no denial of the receipt of both appears in the correspondence and no point of

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their absence is to be found in the arguments or judgments in the courts below. It is also true that the land registrar, who, alone gave evidence at the trial in the Land Court, stated that proofs of title included a mukhtar's certificate as well as a certificate of succession, but no complaint of the absence of these documents is to be found in the letters emanating from or passing within the precincts of the land registry, and no point as to their absence appears to have been taken in the courts in Palestine.

It is said, however, that the absence of consent by the Director of Lands is a fatal flaw, that even if he indicated his consent with regard to the unmortgaged properties on June 4, and of the mortgaged properties also by the letter of September 16, that consent was not given before the disposition and, in any case, was not given to the applicant but was merely a departmental communication. These letters are, indeed, dated after the dedication and wakfieh. In their Lordships' view, however, the word "first" in s. 4, sub-s. 2, is not to be taken as meaning "before the dedication," but as conveying that the consent must be given before the disposition becomes effective. This view is borne out by the terms of s. 4, sub-s. 1, where it is said that the disposition shall not be valid until the provisions have been complied with, not as is the case with a failure to obtain the Director's consent at all, that the disposition is null and void under s. 11, sub-s. 1. Moreover, in their Lordships' opinion, the necessity of obtaining the written consent of the Director does not require that the consent should be communicated to the petitioner. In fact, from the terms of the Director's letter of September 16, their Lordships would draw the inference that at any rate the Director's consent to registration of the unmortgaged property had been communicated to the applicant, but provided the Director had assented in writing they do not think that his consent must reach the applicant. It is required by the registrar of lands as his authority for the transfer, not by the transferee as part of his title. Their Lordships are therefore of opinion that the provisions of the Land Transfer Ordinance have been sufficiently complied with.

There remains, however, the question whether a disposition of immovable property by way of gift can take effect before registration. The Chief Justice of Palestine thought not and Edwards J., though with some reluctance, concurred. This view is expressed in the words "A dedication of land as waqf" "does not become a disposition until such dedication has been" "registered under and in accordance with the provisions of the

“Land Transfer Ordinance.” (1). In truth, however, under the definition contained in s. 2 of the Land Transfer Ordinance “disposition” means (inter alia) “dedication of waqf of every description,” and is no less a disposition though it has not yet been registered. The question now under consideration, as their Lordships see it, is not whether there has been a disposition but whether the voluntary transfer had been completed or sufficiently completed before the lady’s death or whether it must be regarded as an incomplete transfer, which the law would not perfect after the decease of the dedicator. In this connexion their Lordships were referred to a number of cases tried in the Courts of Palestine in which conflicting decisions have been given. In the first of these, *Lababidi v. Ma’mour Awqaf* (2) there does not appear to have been either petition, consent or registration. The dedicator was mutawalli, remained in possession, and sold part of his property. He had done nothing towards perfecting his gift and his transfer might well be held to be ineffective. *El Muwaqqet v. El Turk* (the *Turk* case) (3) was decided in favour of the validity of the disposition. In that case consent was held to have been obtained, and it does not seem to have been suggested that any of the other formal steps had been omitted, save only that the transfer had not been registered. In these circumstances the Supreme Court, sitting as a Court of Appeal, held that the dedication was not null and void under s. 11 and ordered that transfer in the registry into the names of the heirs of the dedicators should be annulled. In a third case, also on appeal, *Abdul Jaber v. Qadi of the Shari’a Court, Jenin* (4), the facts appear to have been somewhat similar to those in *Lababidi’s* case (2) and the same result followed. The court seems to have laid some stress on the fact that a consent which had, perhaps, been obtained seven years after the execution of the wakfieh, was obtained too late, and it may well be that after that lapse of time a consent would be ineffective.

Of these three cases the first and last would appear to depend on facts differing from those in the present case, which, indeed, presents features more favourable to the efficacy of the dedication than even the second, since in that case no attempt at registration seems to have been made, whereas here the lady or her advisers seem to have taken every requisite step but only to have failed to obtain the necessary registration owing to the

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(1) (1943) 10 P. L. R. 669.

(3) (1943) 10 P. L. R. 159.

(2) (1942) 9 P. L. R. 608.

(1) (1943) 10 P. L. R. 552.

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delay (no doubt unavoidable) in the registry itself. In these circumstances their Lordships do not think that the dedication fails because the transfer had not been registered before the lady's death. She had done all the acts required to be done by her, even to putting the mutwallis into possession. Nothing remained to be done which she could do or which would require an order of the court to compel her to do in order to complete the disposition. Indeed, so far as she was concerned the dedication, having been completed in the Shariah Court, was irrevocable. No doubt, as was held in the *Turk* case (1), purchasers for value or mortgagees would take precedence of volunteers whose title, though earlier in date, was unregistered, at any rate if they were without notice of that disposition, but heirs do not give consideration for the land they inherit: they are successors, not purchasers, and are in no better position than volunteers, and, as their Lordships have already pointed out, the disposition is not null and void except where the necessary consent has not been given. In other cases it is merely invalid, and even then only until the prescribed provisions have been complied with. In the present case no further order of the court is required on behalf of the appellants to enable the appellants' title to be completed. The registrar unless prevented by injunction was, and no doubt is, prepared to register the appellants as owners of the property. In these circumstances in their Lordships' opinion the fact that Sitt Amineh died before registration could take place did not prevent the disposition being a valid one, capable of being registered after her death.

They will therefore humbly advise His Majesty that the appeal should be allowed, the order of the Supreme Court discharged, and the order of the judge of the Land Court restored. The respondents must pay the costs of the hearing before their Lordships' Board: the costs in the courts in Palestine to be payable out of the estate.

Solicitors for appellants: *Stoneham & Sons.*

Solicitors for respondents: *Bartlett & Gluckstein.*

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[HOUSE OF LORDS.]

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WOODS APPELLANT

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17, 19, 22,
23, 24, 25,

AND

DUNCAN AND OTHERS RESPONDENTS

29, 30;
Nov. 1, 2, 5,

DUNCAN AND ANOTHER CROSS-APPELLANTS

6, 7.

AND

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HAMBROOK AND ANOTHER RESPONDENTS

Feb. 27.

DUNCAN AND ANOTHER APPELLANTS

AND

CAMMELL LAIRD & COMPANY,
LIMITED RESPONDENTS.

*Negligence — Submarine — Sunk with loss of life — Diving trials —
Torpedo tube test-cock blocked with paint—Claims for damages—
Liability—Res ipsa loquitur.*

In a submarine constructed for the Royal Navy there were six torpedo tubes, each with a bow-cap, operated by telemotor apparatus; at the seaward end and, at the inner end, a rear door which could not be opened without raising a small lever or test-cock so devised that when it was lifted a jet or trickle of water would emerge from a hole in the door if the tube were more than half full. To clear the hole of obstructions a pin or rimer was attached by a chain to the test-cock lever, the primary function of which was to indicate when torpedoes were being fired, whether the tube was more than half-full of water. There was a mechanical indicator for each tube to show whether its bow-cap was open or shut. When the submarine left the builders' yard for diving trials, no torpedoes were taken. The crew consisted of officers and ratings of the Royal Navy and the complement included several civilians, employees of the builders and other firms concerned in manufacturing the equipment. (While the submarine was submerged W., the torpedo officer, opened the rear door of one of the tubes to inspect the interior. The bow-cap was open and in consequence the submarine sank to the bottom, all those within perishing, with the exception of four, among whom was W. According to his evidence, before opening the rear door he raised the test-cock, from which no water emerged; read the indicator, which showed the bow-cap to be shut; and asked H., the seaman in charge of the levers operating the bow-caps (who perished in the disaster) whether everything was correct, receiving an affirmative reply. He made no use of the rimer to ascertain whether the test-cock hole was free from obstructions. After the lever operating any bow-cap

*Present: VISCOUNT SIMON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD PORTER and LORD SIMONDS.

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had been turned to "shut" or "open," the bow-cap could be kept in position either by leaving the lever as it was or by turning it to neutral. When the submarine was subsequently raised, the relevant lever was found to be at neutral and the bow-cap open. The hole of the test-cock was found to be completely blocked with the bitumastic paint used for painting the inside of the torpedo tube. The widows of two civilians who perished in the submarine brought actions for damages against (a) W., (b) the widow of H., (c) the builders, and (d) the sub-contractors who painted the tubes :—

Held (1.) that W. was not negligent, in as much as he had read the indicators and was entitled to rely on H.'s statement that all was correct, and although it was not the function of the test-cock to show whether the bow-cap was open or shut it was not negligent to make use of it to support the evidence of the indicator ; (2.) that there was no evidence that H. was negligent ; (3.) that though the builders and sub-contractors were negligent in regard to the blocking of the hole, they had no reason to suspect that its blocking would be dangerous to the husbands of the plaintiffs.

* The principle of *res ipsa loquitur* only shifts the onus of proof, in that a *prima facie* case is assumed to be made out, throwing on the defendant the task of proving that he was not negligent ; this does not mean that he must prove how and why the accident happened ; it is sufficient if he satisfies the court that he personally was not negligent.

In this case the possibility that some person moved the levers unknown to W. and H. could not be overlooked.

Decision of the Court of Appeal (sub nom. *Duncan v. Cammell Laird & Co., Ltd.* ; *Craven v. Same* ; *Duncan v. Wailles Dove Bitumastic, Ltd.* ; *Craven v. Same*) 171 L. T. 186, reversed as regards W.

APPEAL from the Court of Appeal.

Rose Duncan and Mabel Craven, the widows of two men who perished in the submarine *Thetis*, brought actions against Lieutenant Frederick Woods, the torpedo officer, Matilda Hambrook, the widow of Leading Seaman Hambrook, who was in charge of the levers operating the bow-caps, Cammell Laird & Co., Ltd., the builders, and Wailles Dove Bitumastic, Ltd., the sub-contractors who painted the torpedo tubes. Wrottesley J. gave judgment against Cammell Laird & Co., Ltd. and dismissed the claims against the other defendants. The Court of Appeal allowed an appeal by Cammell Laird & Co., Ltd. and also a cross-appeal by the plaintiffs against Woods. He now appealed to the House of Lords and the plaintiffs cross-appealed.

The facts, summarized in the headnote, are fully stated in their Lordships' opinions.

Sir Donald Somervell K.C. and *H. L. Parker* for the appellant Woods and the respondent on the cross-appeal, Matilda Hambrook. In everything that the appellant did in connexion with the opening of the rear door he acted with reasonable care for the safety of Duncan and Craven. Before doing so he took ordinary and proper steps to satisfy himself that the bow-cap was shut, as it should have been. He could not be expected to act on the basis of the triple negligence which had in fact occurred, the painting over of the hole, the failure of those responsible for the inspection to detect it and the unauthorized opening of the bow-cap by some person unknown. In considering the facts of this case the court will not be wise after the event. Negligence is not established by proving that the loss "might possibly and with extraordinary foresight and prudence" have been avoided": *Rothschild v. Royal Mail Steam Packet Co.* (1). See *Hart v. Lancashire & Yorkshire Ry. Co.* (2). The maxim *res ipsa loquitur* applies where the plaintiff proves (a) the happening of the accident, and (b) that the thing in question was under the management of the defendant. Then the jury can without further evidence find that the defendant was negligent. But the maxim is inapplicable in the present case. If no one had been rescued and there had been no evidence at all of what occurred, a verdict could not have been given against the appellant's administrators simply on the ground that he was torpedo officer. He was subordinate to other officers and he was not responsible for the acts of Hambrook and still less of Cammell Laird & Co., Ltd. There are several defendants in these proceedings against whom negligence is alleged. The appellant has given a complete account of what he did and the position is the same as in an ordinary case. It must be decided on the evidence presented and on the credibility of the witnesses whether or not there was negligence on his part. The onus of proving that he was not negligent has not been shifted on to him: see *Ballard v. North British Ry. Co.* (3) and *Mahon v. Osborne* (4). Even if *res ipsa loquitur* did apply he would not be bound to show how the accident occurred. It is not disputed that he was a candid and accurate witness and his evidence should be accepted that he read the indicator correctly and saw that it marked the bow-cap as shut. It is common ground that it was shut when Hambrook went to the levers. In the circumstances he was

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(1) (1852) 18 L. T. (O. S.), 354.

(2) (1869) 21 L. T. 261, 263.

(3) 1923 S. C. (H. L.) 43.

(4) [1939] 2 K. B. 14.

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not negligent in failing to give an express order for the levers to be put at shut. His failure to use the rimer was not negligent, for that was not part of the drill. In his experience he had never known a test-cock wholly blocked. He was entitled to assume that the vessel coming from the yard of a skilled maker was in working order, just as a man who buys a Rolls Royce car is entitled to assume that it is in working order. Accordingly he could legitimately assume that the fact that no water came out of the test-cock meant that there was no water in the tube. It was impossible for him to act all the time on the assumption that some part of the machinery was out of order.

Sir Walter Monckton K.C., Geoffrey Hutchinson K.C., E. Holroyd Pearce K.C. and MacIntyre for the respondents and cross-appellants *Rose Duncan and Mabel Craven*. Woods was negligent in that, as torpedo officer in charge of the torpedo compartment, he did not exercise proper supervision or care in detecting the true state of the torpedo tube and, having failed to detect that the bow-cap was open, he opened the rear door. Hambrook was also negligent in that, while he was in charge of the levers controlling the bow-cap, he either opened it or caused or allowed it to be opened. Their negligence was the direct cause of the accident and of the deaths of Duncan and Craven. Cammell Laird & Co., Ltd., were negligent in that they allowed the submarine to go to sea for her diving trials in an unsafe and dangerous condition with the test-cock aperture blocked with paint, in breach of their duty in this respect. They failed to discover the defect by neglecting to provide proper and adequate supervision or inspection of the painting carried out by their sub-contractors. They also failed to provide any person or system to ensure that the submarine was as fit for her trials as reasonable care and skill could make her. Wailes Dove Bitumastic, Ltd., were negligent in that their servant, when painting the rear door blocked and obstructed the test-cock hole and so prevented it from functioning properly. This negligence was the direct cause of the accident. This may be a case where concurrent causes have combined to bring about the accident but these respondents are bound to recover, since if Woods was wrong in relying on the test-cock to inform him as to the condition of the tube, he acted negligently and if he was right then its failure was due to the negligence of Cammell Laird and the Bitumastic Company. As regards the case against Woods, the doctrine of *res ipsa loquitur* applies. Not only was the bow-cap open but he was in control of the torpedo

compartment and he himself opened the rear door. He did not give a clear and specific order to Hambrook to close the bow-cap and he relied on the test-cock without using the rimer. If the test-cock was not primarily for showing whether or not the bow-cap was open he should have looked at the indicator again. As regards Hambrook, he was standing by the levers and taking his orders from Woods and the most probable inference is that he moved this lever to "open." The bow-cap was closed when the submarine sailed and it could not have been opened until power was put on shortly before the rear door was opened. The possibility that the levers were moved accidentally or by an intruder may be eliminated because no one was seen near them and the place was so narrow that it would be hard for anyone to go there unobserved; it was also unlikely, that anyone would get to that spot of that the naval men in charge would permit anyone to do so. Moreover, once the power was on, the levers were hard to move and could hardly have been moved inadvertently. As regards Cammell Laird, they put into the hands of the naval personnel a ship which was in fact in such a state as to endanger the lives of those on board by reason of a trap and they are therefore liable for the loss of the lives so endangered. *Donoghue v. Stevenson* (1) applies. There was no reasonable probability of intermediate examination by the Admiralty disclosing the defect on the diving trials for, assuming that Cammell Laird had parted with possession of the submarine, they did not do so, at the earliest, until the naval personnel took control for the diving. The naval men were only concerned with the power of the ship to dive. It was not for them to test the fittings generally. The mere existence of a chance of intermediate examination is not enough to break the chain rendering Cammell Laird liable: see *Haseldine v. C. A. Daw & Son, Ltd.* (2) and *Herschthal v. Stewart & Ardern, Ltd.* (3). In fact Cammell Laird were at all material times in control of the submarine and therefore bound to provide safe premises and a safe system of working. Their responsibility for the ship continued long after the trials until she was accepted. They retained general control and only permitted the naval personnel to use the vessel. Accordingly *Indemauro v. Dames* (4) applies, and they are not absolved from liability: see *Marney v.*

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(1) [1932] A. C. 562.

(2) [1941] 2 K. B. 343.

(3) [1940] 1 K. B. 155.

(4) (1866) L. R. 1 C. P. 274.

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Scott (1). The defect which they overlooked in fact rendered the ship dangerous irrespective of diving since this torpedo tube was always under water. As regards liability for the death of Craven, who was an employee of Cammell Laird, the defence of common employment will not avail, because what is complained of is an act or omission of management and not of any particular employee. As regards the Bitumastic Company, they are liable, even if Cammell Laird are held to be absolved, for a man who blocks a hole in the rear door of a torpedo tube does so at his own peril by reason of the exceptional measure of danger involved. The opportunity for intermediate inspection, which might relieve Cammell Laird from responsibility, does not avail them, because the exceptional degree of danger involved in the normal contemplated use of a torpedo tube is such that it imposes on the person responsible for its use an exceptional obligation to take care. A torpedo tube belongs to the class of articles, such as firearms, which have been described as "dangerous in themselves" and in respect of which an opportunity for intermediate inspection affords no relief from liability. Articles of this class have been held to involve a special degree of liability in the persons sending them forth: *Dominion Natural Gas Co., Ltd. v. Collins* (2). Owing to the carelessness of the servant of the Bitumastic Company, for which they were responsible, Woods did not receive a warning which he would otherwise have received. [They referred to *Wilchick v. Marks & Silverstone* (3); *Heap v. Ind, Coope & Alsopp, Ltd.* (4); *Hay or Bourhill v. Young* (5); *Yorkshire Dale Steamship Co. v. Minister of War Transport* (6); *In re Polemis & Furness Withy & Co., Ltd.* (7); *Burfitt v. Kille* (8); *Paine v. Colne Valley Electricity Supply Co., Ltd.* (9); *Bottomley v. Bannister* (10); *Hodge & Sons v. Anglo-American Oil Co.* (11); *Grant v. Australian Knitting Mills, Ltd.* (12); *Otto v. Bolton & Norris* (13); *Farr v. Butters Brothers & Co.* (14); *Buckner v. Ashby & Horner, Ltd.* (15); *Macpherson v. Buick Motor Co.* (16); *Blackmer v. Lake &*

(1) [1899] 1 Q. B. 986, 989, 992, 993.

(2) [1909] A. C. 640.

(3) [1934] 2 K. B. 56.

(4) [1940] 2 K. B. 476.

(5) [1943] A. C. 92, 101, 106.

(6) [1942] A. C. 691, 715.

(7) [1921] 3 K. B. 560.

(8) [1939] 2 K. B. 743.

(9) (1938) 160 L. T. 124.

(10) [1932] 1 K. B. 458.

(11) (1922) 12 Ll. L. Rep. 183.

(12) [1936] A. C. 85.

(13) [1936] 2 K. B. 46.

(14) [1932] 2 K. B. 606.

(15) [1941] 1 K. B. 321.

(16) (1916) 217 N. Y. 382.

Elliot, Ltd. (1), and an article by Lord Porter on The Measure of Damages in Contract and Tort (1934), 5 Cambridge Law Journal 176.]

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Sellers K.C. and *Nelson K.C.* for the respondents, *Cammell Laird & Co., Ltd.* The sinking of the submarine and the loss of life consequent thereon was not due to any negligence or breach of duty on the part of these respondents or their servants or agents. They were guilty of no breach of duty and took all reasonable care. In this case there is the greatest difficulty in arriving at an acceptable account of what really took place. Accordingly the actions must fail unless this is a case of *res ipsa loquitur*. It is not possible to bring home any legal responsibility to these respondents. The torpedo tubes were not made by them. They were made with great secrecy and a minimum of information about them was given to the respondents who simply had to fit them into the hull, building the submarine round the essential parts. They had no means of knowing that the blocking of this hole was dangerous and the only reason why the tubes were not brought to their yard already painted was that the bitumastic enamel might have chipped in the fitting. They were under no contractual duty to see that the hole was clear and, apart from contract, an ordinary reasonable man would not necessarily have appreciated the danger of blocking it. Further, the opportunity for inspection by the Admiralty overseers absolved these respondents from liability. The fundamental fact in this case is that if the lever had been at "shut" this accident could not have happened, whatever the condition of the test-cock on the indicator. There was no danger in the blocking of the test-cock since its sole use was in the draining process of the torpedo tubes, a wholly different purpose from showing whether the bow-cap was open or shut. No one would ever have opened the test-cock with the bow-cap open. Accordingly the blocking of it was not the cause of the loss since the mere fact that the tube was full of water would not have had that effect. That would only have let two tons of water into the compartment and the only persons in danger would have been those in the immediate vicinity of it. The cause of the sinking was the open bow-cap. The submarine was fit for her tests and that condition did not exclude the possibility of defects which might be revealed by those tests, such as this trivial defect in the test-cock. That did not make the ship unseaworthy. Clocks, ventilators, port-

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holes and hatch-covers may need adjusting in such cases but that necessity does not make a ship unseaworthy. Such things may be put right in the course of ordinary user. The ship was fit to go to sea in the sense of seaworthiness and stability, that condition did not make diving dangerous since opening the rear door was no part of the diving operation; it was necessary only for the firing of torpedoes. Moreover, the fact that some precaution has been neglected before sailing does not necessarily render a ship unseaworthy: see *Virginia Carolina Chemical Co. v. Norfolk & North American Steam Shipping Co., Ltd.* (1); *Cunningham v. Colvils, Lowden & Co.* (2); Arnould on Marine Insurance (12th ed.), p. 967, art. 720 and Carver on Carriage by Sea (8th ed.), p. 24, et seq. The loss was due to the negligence of Woods. It is not denied that he fully believes what he says but he should not be accepted as always accurate. He was not careful. In particular he should have used the rimer. Its use was at the time no part of the drill but what is appropriate in action is not necessarily appropriate to the occasion of a trial, the object of which is to ascertain faults, so that everything should be approached with suspicion and tested. A trial called for the use of the rimer. That obligation was on Woods if he was to rely on the test-cock. As regards the lever the correct position was "shut" and there was negligence on the part of Woods or Hambrook in that it was not at that position. Woods in particular should have given a clear and unequivocal order and between them they could have insured the safety of the ship by so placing the lever. There is no cause of action against the respondents Cammell Laird & Co., Ltd. Since the respondents Rose Duncan and Mabel Craven have no cause of action against them in contract, they could only succeed if they showed (a) that Cammell Laird acted carelessly and (b) that the negligence was a breach of some duty owed to them. But Cammell Laird were acting with care in allowing Wailes Dove Bitumastic, Ltd., to paint the tubes with their preparation since this was expressly required by their contract with the Admiralty and the tubes were afterwards inspected by an Admiralty surveyor. *Donoghue v. Stevenson* (3) has a much more limited effect than that contended for by the respondents, Rose Duncan and Mabel Craven. *Grant v. Australian Knitting Mills, Ltd.* (4) adds little

(1) (1912) 17 Com. Cas. 277.

(2) (1888) 16 R. 295.

(3) [1932] A. C. 562.

(4) [1936] A. C. 85.

to it. [They also referred to *Hay v. Bourhill* (1); *Glasgow Corporation v. Muir* (2); *Farr v. Butters Brothers & Co.* (3); *Otto v. Bolton & Norris* (4); *Buckner v. Ashby & Horner, Ltd.* (5); and *Haseldine v. C. A. Daw & Son, Ltd.* (6).] Further, Cammell Laird did not fail in their duty as employers to provide a safe system of work: *Wilsons & Clyde Co., Ltd. v. English* (7) and *Colfar v. Coggins & Griffiths (Liverpool), Ltd.* (8). Confusion in this case is avoided if it is approached from the right end. For example, if a motor car with defective brakes skidded on ice and ran on to the pavement doing damage, the first person to be sued would be the driver and the plaintiff might never go so far back as to consider the liability of the garage owner for not adjusting the brakes. In the present case the starting point is that the cause of the accident was the opening of the rear door with the bow-cap open. In the absence of any further evidence the plaintiffs have established a prima facie case against Woods and that would be sufficient if nothing else were said by him. He suggested three possible answers: (a) that a mysterious stranger or a hidden hand had tampered with the levers; (b) that he used the indicator and the apparatus properly, taking the prescribed precautions and (c) that he relied on the test-cock. But the stage of considering the liability for the state of the test-cock is never reached because Woods did not establish that he had taken all the steps he should have done before touching it. A high standard of care was imposed on him in handling these torpedo tubes, for standard of care increases in direct proportion to the dangers with which a man is dealing. Thus, if a man points a loaded gun at another and fires, it is no excuse to say that he thought or had been told that it was not loaded. Woods did not by the proper use of the appropriate instruments ensure that the bow-cap was shut. Since the bow-cap was open when he opened the test-cock he could not have done so and accordingly he did not take the care that a skilled officer should have done. In the first place, he must have read the indicator wrongly and in the second, since he knew that the test-cock hole could be blocked, he should have tested it with the rimer. If it had been blocked with mud or sea-weed instead of bitumastic paint he would not have been excused. However, assuming that this test-

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- (1) [1943] A. C. 101.
- (2) [1943] A. C. 448, 454.
- (3) [1932] 2 K. B. 606.
- (4) [1936] 2 K. B. 46.

- (5) [1941] 1 K. B. 321.
- (6) [1941] 2 K. B. 343.
- (7) [1938] A. C. 57.
- (8) [1945] A. C. 197.

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cock did play a part in causing the disaster, the next link in the chain is the Admiralty official who inspected the tubes and, if Woods is exonerated, then this official must be responsible for misleading everyone by passing the work and launching a dangerous thing on the world. He knew the secrets of the construction of the torpedo tubes and Cammell Laird did not. Had there been such an inspection in *Donoghue v. Stevenson* (1) the defendant would not have been liable.

Streatfeild K.C. and *H. Fletcher Moulton* for the respondents *Wailes Dove Bitumastic, Ltd.*, were not called on to argue.

Sir Walter Monckton K.C. in reply on the cross-appeal, referred to *The Oropesa* (2); *Burrows v. March Gas & Coke Co., Ltd.* (3); *Sharp v. Avery* (4); *Haseldine v. C. A. Daw & Son, Ltd.* (5); *Kimber v. Gas Light & Coke Co.* (6); and *Salmond on Torts*, 10th ed., p. 150.

THE HOUSE took time for consideration.

Feb. 27, 1946. VISCOUNT SIMON. My Lords, this complicated and difficult appeal arises from consolidated actions brought by the respective widows of David Duncan, an employee of Brown Brothers, Ltd., and of Archibald Craven, an engineer's fitter in the employment of Cammell Laird & Co., Ltd. (hereinafter called Cammell Laird), both of whom lost their lives in the disaster to the submarine *Thetis* when she foundered and struck the bottom in Liverpool Bay on June 1, 1939. The submarine, which had been built at Cammell Laird's yard at Birkenhead, was engaged in diving trials and had not yet been accepted by the Admiralty. The two plaintiffs sue as personal representatives on behalf of the dependants of the respective deceased, and the claim is for damages for negligence, that is, for breach of a duty, alleged to be owed to the deceased by the defendants sued or one or more of them, to take reasonable care, as a consequence of which breach of duty their husbands lost their lives. Claims by many other plaintiffs depend on the decision in this appeal. The defendants now before the House in the consolidated actions are (1.) Lieutenant Woods, who was one of four who escaped from the submarine, (2.) Mrs. Hambrook, the widow of Leading Seaman Hambrook, who was lost in the

(1) [1932] A. C. 562.

(2) [1943] P. 32, 37, 39.

(3) (1872) L. R. 7 Ex. 96.

(4) [1938] 4 All E. R. 85.

(5) [1941] 2 K. B. 343, 375.

(6) [1918] 1 K. B. 439, 443, 445, 446, 447.

disaster, (3.) Cammell Laird, and (4.) Wailles Dove Bitumastic, Ltd. (hereinafter called the Bitumastic Company). Wrottesley J. who tried the action, entered judgment for the plaintiffs against Cammell Laird and exonerated the other defendants, but the Court of Appeal (Lord Greene M.R., Goddard and du Parc L.J.J.), reversed this decision so far as Lieutenant Woods and Cammell Laird are concerned, holding that Lieutenant Woods was liable, but that Cammell Laird's appeal should be allowed. In this House, therefore, Lieutenant Woods is appealing for the reversal of the Court of Appeal's judgment against him, while Mrs. Duncan and Mrs. Craven seek to restore the trial judge's judgment against Cammell Laird as an addition, or an alternative, to the judgment they obtained in the Court of Appeal against Lieutenant Woods. They are also claiming judgment against the defendants (2.) and (4.), who have escaped liability in both the lower courts. Each of these issues has to be separately considered and pronounced upon in turn. The material on which our decision must be based is contained not only in the evidence given before Wrottesley J. in 1943, but also in testimony extending over seventeen days at a tribunal of inquiry into the loss of the *Thetis* which began in July, 1939 and was presided over by Bucknill J.

H.M.S. *Thetis* was a submarine two hundred and seventy-five feet long divided by transverse bulkheads into a number of compartments. The most forward was the torpedo tube compartment, after which came the torpedo stowage compartment. The control room was amidships, with the main engine room immediately abaft of it. In the torpedo tube compartment there were six torpedo tubes, of about twenty-one inches diameter, each fitted with a hinged bow-cap at the seaward end, which could be opened or shut by telemotor apparatus as described below. The six tubes were arranged in two tiers of three each, Nos. 1, 3, and 5 being the descending order of the starboard tier, and Nos. 2, 4 and 6 of the port tier. When the submarine was afloat, Nos. 5 and 6 were always below the level of the sea. There was a narrow alley-way amidships between the two tiers, at the far-end of which were fixed the six bow-cap indicators hereinafter referred to. There were also two still narrower alley-ways or culs-de-sac, between each tier and the skin of the ship on the port and starboard side respectively. Fastened to the skin of the ship on each side in a vertical position four feet six inches forward of the mouth of these last-named alley-ways, was a control panel consisting of a set of three

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levers and pairs of appropriate valves, by the moving of which the bow-caps, in certain conditions, could be actuated. Each torpedo tube had a circular rear door, swinging on a hinge and fitted with a large lever by which the door could be locked or unlocked. If a torpedo was to be placed in the tube and fired the rear door would be opened in order to insert it, and then closed before the bow-cap was opened to permit it to be discharged by compressed air. At the time of the disaster, the tubes were unloaded and no torpedoes were on board. There was fitted to each rear door, half way up, a small lever known as a test-cock. When the test-cock lever was pointing down, a bolt to which it was attached prevented any opening of the door by the large lever. Before the door could be opened, this small lever had to be lifted by hand round through the horizontal position till it was pointing upwards, by which motion the bolt was withdrawn. Moreover, when the lever passed through the horizontal position, it placed in line a hole of three-eighths of an inch diameter in the attached fitting and an orifice of similar size in the door itself, so that if there was water in the tube up to more than half-way, water would come out into the compartment through the hole, if unobstructed. A "rimer" or pin was attached by a chain to the lever attachment which could be used to clear the hole if obstructed. The primary purpose of the hole in this test-cock device was to inform the officer in charge, when torpedoes were being rapidly fired in succession from a tube, whether the tube was at the moment more than half-full of water, for the rear door ought not to be opened until enough water was drained away after a previous discharge to leave the tube less than half-full, otherwise an undue quantity of water would be admitted into the torpedo tube compartment. It is necessary, for the proper understanding of the issues raised in the case, to describe more precisely the working of the apparatus used to move the bow-caps and to hold them in the desired position. The power, which was provided by a column of oil under pressure, came from abaft the torpedo stowage compartment. It was controlled by isolating valves placed at No. 40 bulkhead at the after end of that compartment and by control valves situated on the control panels fixed on either side of the torpedo tube compartment. In order that power may be employed to open or close a bow-cap, (1.) the isolating valves must be opened and power thus brought along to the control panels, (2.) the pair of control valves pertaining to the relevant bow-cap must be opened by

turning small wheels, and (3.) the appropriate lever must be moved so that its pointer is turned to the "open" position if it is desired to open the bow-cap (a turn of about 45° from neutral), or in the reverse direction to the "closed" position by a similar turn. When the operation is completed, the bow-cap can be kept in position either by leaving the valves and levers as they are, or by locking the power in the pipes between the control panel and the bow-cap by moving the lever to neutral. The advantage of the latter method is that any loss of power by fracture or otherwise in the pipes abaft the control panel will not reduce the pressure which is being exerted on the bow-cap.

On the morning of June 1, 1939, the *Thetis* left Cammell Laird's shipyard at Birkenhead to be subjected to her diving trials. Clause 4 of the shipbuilding contract between Cammell Laird and the Admiralty provided that the former would "carry out all the trials mentioned in the conditions and "specification"; condition 9 provided that all trials should be at the risk of the contractors, but that "diving . . . trials " . . . will be carried out by naval officers and crew, but the "contractors shall work the main and auxiliary machinery." The apparent contradiction in phraseology indicates a division of responsibility on board, where out of a total complement of one hundred and three, fifty-three were officers or ratings of the Royal Navy provided by way of crew, sixteen more were also in the service of the Admiralty, while twenty-six (including Mr. Robinson, foreman engineer, and his subordinate Mr. Eccleston, as well as Craven), came from Cammell Laird. One of the remaining eight was Duncan, whose firm had supplied the steering gear. Some of the naval personnel—including Lieutenant-Commander Bolus who was nominated to command the vessel, the appellant Lieutenant Woods who was to be torpedo and gunnery officer in charge of the forward end, and Leading Seaman Hambrook, an experienced rating who would serve under Lieutenant Woods' orders—had been for some time attending the building and fitting of the submarine in order to familiarize themselves with her structure and design. It must be added that before the diving trial took place, Cammell Laird had certified, as the contract expressly required, that the vessel was "in a proper condition to undertake" the trial: this certificate was countersigned by Commander Bolus, and by several Admiralty officials. The date of this certificate was April 12.

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The *Thetis* proceeded, under the captaincy of Commander Bolus, to a position in Liverpool Bay for her first dive at sea. A "trim chit" had been prepared before she left Birkenhead, showing a calculation of the extent to which various tanks would have to be filled (in addition to the main tanks) in order to produce the condition of neutral buoyancy. When in this condition, the sloping of her hydroplanes would bring about the dive. With the exception of the main tanks, the filling would normally take place before the vessel started; but when the main tanks also had been filled at sea, in immediate preparation for diving, the vessel was found to be still too light to dive properly. Lieutenant Woods had already visited the control room and asked to look at the trim chit. (The actual document was recovered when the *Thetis* was brought from the bottom in November, 1939, and was in evidence at the trial.) The trim chit showed that, as the result of some revision, tubes 5 and 6 were entered as intended to be full (of course, with bow-caps closed). Lieutenant Woods returned to the front compartment, in order to ascertain, by lifting up the test-cocks, whether these tubes were in fact full, or at any rate more than half full. From No. 6 there came a trickle of water, showing that it was half full or a little more; from No. 5 no water issued at all. Lieutenant Woods reported that the tubes were not full to the control room and the question was raised whether these two tubes were "meant to be full." Mr. Robinson was there. He had himself taken part, with Eccleston, in putting on the trim before starting and he declared that they were not meant to be filled. This statement must have confirmed Lieutenant Woods' deduction that No. 5 tube was not full. He returned again to the tube compartment and repeated his test with the same results. On neither occasion did he use the rimer. When the submarine was raised, it was found that the hole in the rear door of No. 5 tube was completely blocked up by bitumastic enamel, so that whatever the amount or pressure of water in that tube, raising the lever to horizontal would not enable it to escape. Lieutenant Woods, being satisfied that neither No. 5 nor No. 6 was full, again went to the control room and ascertained that it might be necessary to fill them in order to assist the vessel to dive. The filling would be effected from the sea by opening bow-caps. Accordingly, power was put on by opening the isolating valves at No. 40 bulkhead. Lieutenant Woods then told Hambrook to open the control-valves, which he did. Next, Lieutenant

Woods (according to his evidence at the inquiry conducted by Bucknill J.), asked Hambrook if all the levers were "in the shut-position," and on getting the reply that they were, asked if "everything was correct" to which Hambrook reported "Yes." Four years later, when giving evidence at the trial, Lieutenant Woods said that he first asked Hambrook whether the levers were "parallel" and got the affirmative answer. The better view seems to be, as the trial judge thought that the earlier version was correct, and that the inquiry as to "parallel" levers was made after the flooding. I may say at once that I do not attach much importance to this difference: at any rate, I do not think that the question whether "everything was correct" was ambiguous. Lieutenant Woods and Hambrook were both experts and knew one another's meaning. The questions and answers were plainly directed to ascertaining that the bow-caps were shut, but were ready to be opened. When the *Thetis* was raised, it was found that the levers were, with an insignificant variation, parallel in the neutral position. Everything now being in order for filling Nos. 5 and 6, if so directed, Lieutenant Woods decided to use the interval in examining the interior of the tubes with the help of an electric torch, in order to see if there was any sign of leakage at the seating of the bow-caps. I agree with the Master of the Rolls that he was justified in choosing this occasion for this inspection, when the bow-caps were submerged and under pressure from the sea. Lieutenant Woods testified that, before making this examination of the tubes he went along the alley-way between the two tiers, and read the bow-cap indicators which were mechanically connected with the bow-caps themselves and showed the position of each. Each of the indicators, according to him, showed the bow-cap as shut, including the indicator of bow-cap No. 5 which was the lowest and most difficult to read. Wrottesley J. accepted this evidence as accurate, and so did the Master of the Rolls. I do not think that a different view ought to be taken of it, even though the evidence involves the consequence that though the bow-cap of No. 5 was closed at the moment of this inspection, it became open a few minutes later. It was found open, and the indicator so recorded, when the *Thetis* was ultimately raised. This inspection being completed, Hambrook assisted Lieutenant Woods to open each door in turn—Nos. 1, 2, 3 and 4 were found empty and without sign of leak. No. 6 was left unopened, since it was known to be more than half-full of water. On

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opening the rear door of No. 5, there was a continuous rush of water, due to the fact that the bow-cap was open. How this came about is the main and very obscure problem of fact in the case. It was impossible to withstand the invasion of the sea : in spite of most gallant efforts, in which Lieutenant Woods played a chief part, the two foremost chambers were flooded, the vessel took a steep incline and reached the bottom, from which she could not be raised in time to save those imprisoned, except for the four who escaped through the Davis apparatus. The reason why this disaster occurred is, unquestionably, that the bow-cap and the rear door of tube No. 5 were open at the same time, when the tube was below water level. A layman may be permitted to note that there was no means provided to prevent this possibility. Reliance was placed on the expert handling of the apparatus to avoid it. After this lengthy description of what happened, it remains to deal with the questions of liability which we have to decide.

As regards Lieutenant Woods, I have arrived at the conclusion that the negligence alleged against him is not established. There is no dispute that he and Hambrook both owed a duty to those on board to take reasonable care for their safety. The Master of the Rolls (1) considered himself forced to hold that Lieutenant Woods was negligent (a) "in relying on the "test-cock for a purpose for which he knew or ought to have "known that it was never intended, viz., as affording evidence "as to the position of the bow-cap, and " (b) "on an occasion "when it was his duty to see that the proper steps were taken "to ensure that the bow-cap was shut." (c) "He relied on the "test-cock, moreover, without using the obvious means to "test its reliability, viz., by using the rimer which is provided "for that very purpose." Goddard L.J. while agreeing in these conclusions, thought that Lieutenant Woods misread the mechanical indicator, i.e., that the bow-cap of No. 5 was already open. Du Parc L.J. also agreed in the result, basing his conclusion partly on the ground that no "order" was given to Hambrook to put the levers to shut. As I have already indicated, I think that this last criticism does not sufficiently allow for the questions and answers exchanged between Lieutenant Woods and Hambrook and for the understanding existing between them, based on expert knowledge and previous co-operation. The Master of the Rolls' reason (a) appears to be based on the view (which he expressly states in another passage (1)), that the test-cock was "misused." To examine the

(1) 171 L. T. 186, 193.

soundness of this view, we must assume that the hole was unblocked. There was evidence (and it seems on hydrostatic principles correct) that in such circumstances, if the bow-cap of No. 5 was open and that part of the vessel was speeding under the sea, there would have been a strong jet of water issuing—an “extremely strong jet,” according to Lieutenant Woods—whereas if the bow-cap was shut and the closed tube was more than half full of water, the pressure behind the jet would be limited to the head of water in the upper part of the tube. Granted that the test-cock as primarily designed to prevent the rear door being opened in the absence of information as to whether the tube is more than half-full, I cannot see that there was any “misuse” of it if it was regarded as a means of incidental confirmation of the supposed fact asserted by Mr. Robinson, that No. 5 was not filled, from which it followed that the bow-cap of No. 5 was shut, or as a confirmation that the reading of the indicator was correct. But in any case, once it is accepted that a few minutes before the sea was admitted Lieutenant Woods examined the mechanical indicator of No. 5 and correctly read the pointer as being at “shut,” his previous handling of the lever of the test-cock does not matter. Even if he were wrong in his deductions when no water came out, he was completely justified in regarding the bow-cap of No. 5 as shut when the mechanical indicator told him so. And if it had remained shut, the worst that would have happened is that the contents bottled in the tube would have escaped—a result which involved no disaster to the submarine. It is true that when he decided to open the door of No. 5, he would first have to raise the latch of the test-cock for the last time, and would again get no escape of water, but, unless he is to be held to blame for not using the rimer (a question which I discuss a little later), it would be an error to hold him liable because he “relied in part on the evidence of “the test-cock” when he had conclusive evidence from the indicator. There are, as it seems to me, only two possible answers to this line of reasoning. One is to hold that the interval—variously estimated at ten minutes to three minutes—was too long between the inspection of the indicator and the opening of the rear door: a second journey up the alley-way and a second examination immediately before the door was opened would have discovered the pointer at or near “open.” I agree with the Master of the Rolls that, from the point of view of negligence, a second inspection was unnecessary. It is

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true that, had the hole not been blocked, raising the lever would have produced a gush of water, but it seems to me quite unreasonable to hold that, when the indicator had shown that the bow-cap was shut, it was negligence in Lieutenant Woods not to use the rimer. The proposition that, whenever no water issued from the hole, proper practice at that date required that the rimer should be used, goes too far. So invariable a use was no part of the contemporary drill. In a previous submarine Lieutenant Woods had directed that it should be used "periodically." Nothing in his previous experience, as Wrottesley J. points out, had suggested to him that it was not safe to rely on a test-cock or to open a rear door till the rimer was used. He had never known such a hole to be blocked. The rimer was not in fact provided for the purpose of thrusting out a seal of bituminous paint, but for clearing the hole on proper occasions of fortuitous obstacles such as seaweed or incrustations. He was, I think, entitled to assume that the submarine was, in this as in other respects, in normal working order and that any paint had been properly applied. But the main point is that he had received from the indicator at the critical time, a positive assurance that the bow-cap was shut. If the case is put against him on the ground that it is for him to exculpate himself, he does so by pointing to the information so gained. The only other way to impeach the claim that he was justified by his reading of the indicator would be to assert that he did something negligent which rendered such reading illusory. Hence the Master of the Rolls' proposition (b) which insists that he failed in his duty "to see that the proper steps were taken to ensure that the bow-cap was shut." But, on a careful review of the evidence, I do not find adequate material to support this charge. If the opening of the bow-cap was due to the phenomenon of "creep," which Lord Greene has explained so clearly, the error involved is not brought home to Lieutenant Woods. I do not agree that his communications with Hambrook were obscure or misleading. Hambrook's understanding of them must certainly have been to the effect that he was to make sure that all the bow-caps were closed, for otherwise he would never have joined in the suicidal act of opening the rear doors. How the bow-cap of No. 5 became open, if it was correctly recorded as shut a few minutes before, will always be a mystery. It could occur through a movement of the lever, either accidentally or deliberately, in such a way as to start the opening of the bow-cap, followed after a sufficient

interval by a return to approximately neutral ; and in spite of all the difficulties of assuming the last minute intervention, unknown to Lieutenant Woods or Hambrook, of Mr. Robinson or Eccleston, one cannot overlook the fact that, notwithstanding Mr. Robinson's denial, on the revised trim chit No. 5 tube was entered as " full." Moreover, it had been decided on board that No. 5 would have to be filled, and it may have been assumed that Lieutenant Wood and Hambrook would only examine the interior of tubes Nos. 1 to 4. These speculations cannot be resolved when Mr. Robinson, Eccleston and Hambrook are all dead, and it is enough to say that Lieutenant Woods' reading of the indicator justified him in treating No. 5 tube as closed and nothing is shown to have occurred later which disentitles him to rely on this defence. The case against Lieutenant Woods has been put as an application of the principle known as *res ipsa loquitur*, since he was in charge of the forward compartment. Even so, that principle only shifts the onus of proof, which is adequately met by showing that he was not in fact negligent. He is not to be held liable because he cannot prove exactly how the accident happened. Hambrook cannot be held to blame, for there is no sufficient evidence that he acted negligently. From the time that the indicator was seen to record that No. 5 bow-cap was shut, Hambrook, as far as is known, did nothing but assist to open the doors. There is a difference of view among the experts as to whether, when it is desired to shut and keep shut a bow-cap, the lever should be left at " shut " or afterwards brought back to neutral, but this difference does not assist the plaintiffs. I agree with the courts below that Mrs. Hambrook is entitled to judgment.

A more difficult question arises on the claim against Cammell Laird. Before the liability of a defendant to pay damages for the tort of negligence can be established in an action brought by or on behalf of an injured man, three things have to be proved—(1.) that the defendant failed to exercise due care ; (2.) that the defendant owed to the injured man a duty to exercise due care ; and (3.) that the defendant's failure was the " cause " of the injury in the proper sense of that term. As to (1.), the painting of the inside of the rear doors was so carelessly done that in two cases, No. 4 and No. 5, the tell-tale hole was completely blocked, and in that condition was unable to function. Neither Cammell Laird nor the sub-contractors, the Bitumastic Company who actually did the work, can contend

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that this blocking was a matter of no importance—on the contrary, the painter Stinson was at pains to describe the precautions he took to prevent the paint obstructing the holes. The charge-hand painter employed by Cammell Laird to superintend the painting of all steel in the *Thetis* claimed to have inspected the painting of the doors generally, but went so far as to say that it was impossible for paint to block such holes, and thus there was no reason for an inspection to see if it did. When the vessel was raised, his error was patent. Cammell Laird cannot be excused by pointing to the clause in the sub-contract which bound the Bitumastic Company to do the work to the satisfaction of the Admiralty. Neither is Cammell Laird's responsibility for leaving the holes blocked removed by the failure of Admiralty inspectors to observe this condition. The ship-building contract bound Cammell Laird to carry out the building and completion of the submarine "in a proper and workmanlike manner" and facts proving carelessness in carrying out a contract may also amount to negligence in tort. (2.) Next comes the question whether Cammell Laird owed any duty of care to the two men who perished. Without this, there can be no liability to their personal representatives for the results of their negligence. The circumstances are unusual, but I think the duty is made out. Cammell Laird was in possession of the submarine when Duncan and Craven came on board. They and others were there under arrangements which Cammell Laird had made for their presence, including catering arrangements, in order that they should witness or take part in a trial required by the contract and carried out at Cammell Laird's risk. Indeed, I think that Cammell Laird remained in possession, in the relevant sense, throughout, notwithstanding that Commander Bolus took command from the navigational point of view. A man in his own carriage who invites or permits another to drive does not thereby transfer possession of the vehicle. I hold that Duncan and Craven were not, vis-à-vis Cammell Laird, mere licensees. Cammell Laird owed a duty to them, analogous to the duty owed by an occupier to invitees, to see that the former's negligence in relation to the premises did not cause such injury to them as might reasonably be contemplated as flowing from the want of care, the defence of common employment would not avail as against Craven, for the negligence is in respect of a faulty system of inspection. The charge foreman declared that no inspection of the holes after painting was needed at all, and

none was supplied. (3.) Lastly, the crucial question has to be answered whether Cammell Laird's negligence can be said to be the "cause" of the disaster. We have to apply the common-sense tests indicated by this House in *Yorkshire Dale Steamship Co., Ltd. v. Minister of War Transport* (1). It is not, in my opinion, conclusive to say merely that the blocking of the hole is not the cause because nothing would have happened if Lieutenant Woods had not opened the door. That would be like arguing that if a railway accident happens when a train runs past signals which are so badly constructed as to indicate safety when they ought to stand at danger, the faulty construction is not the cause because there would have been no accident if the train had not run on. But what in the present case is decisive is the extraordinary combination of circumstances which produced the disaster. It is easy to anticipate that faulty signals are likely to produce a railway accident, but could Cammell Laird reasonably have in contemplation—the phrase is Lord Atkin's in *Donoghue v. Stevenson* (2)—that those on board when the trial dive was taking place would be put in mortal peril if these holes were blocked? The test-cock apparatus is provided for the purpose of showing whether the tube is less than half-full of water on the occasion of torpedo firing: on the diving trials no torpedoes were to be fired, and indeed there were none on board. The disaster came about because the bow-cap and the rear door of No. 5 tube were open together, though why the bow-cap became open is not precisely ascertained. Whether Lieutenant Woods is to blame, or not, for opening the door does not alter the fact that his action intervened and produced the disaster. After much reflection I have reached the conclusion that the Court of Appeal is right in saying that blocking the hole with paint is not the cause of the accident and Cammell Laird is therefore discharged from liability. These arguments also apply to the position of the Bitumastic Company, with the added consideration that there is no such "proximity"—to use a phrase employed in *Donoghue v. Stevenson* (3)—as would cast on it a duty of care owed to the two deceased. Its workmen painted badly, but remedies in contract, if any, are nothing to the point. Leaving aside the opportunities for intermediate inspection, the Bitumastic Company had nothing to do with sending the deceased to sea on a diving trial with rear doors in this condition.

(1) [1942] A. C. 691.

(3) *Ibid.* 581.

(2) [1932] A. C. 562, 580

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If it be thought remarkable that after so long and elaborate an investigation no one should have been found liable for this loss of life, the answer is that in order to recover damages it is necessary to prove liability against one or other of the parties sued. The key to what is uncertain may have been lost among the ninety-nine who perished in the disaster. I move that Lieutenant Woods' appeal be allowed and that the decision of the Court of Appeal as to the non-liability of the other defendants be affirmed.

LORD RUSSELL OF KILLOWEN (read by LORD MACMILLAN). My Lords, the first question to decide in this case is whether the order of the Court of Appeal entering judgment in favour of the plaintiffs against Lieutenant Woods for damages to be assessed, should stand. The crucial question which is in dispute is whether in the discharge of such duty, if any, as he owed to the two deceased workmen, he failed to exercise reasonable care and was therefore guilty of negligence involving legal liability to the plaintiffs; or whether he exercised reasonable care and is under no such liability. The period of time during which the conduct of Lieutenant Woods has to be considered is about three quarters of an hour. He was the torpedo officer, and was in charge of the torpedo tube compartment. The submarine was being prepared for diving, and, when in the control room, he saw Lieutenant Chapman with the trim chit in his hand. He asked to see it, and on inspecting it noticed that tubes Nos. 5 and 6 were marked as being full of water. That meant that the four tons of water which would be contained therein contributed to the ship's "main ballast trim." With this knowledge he went forward to the tube compartment. After some time he noticed from the depth gauge in the compartment that "we were very slow in getting down." He decided to check the statement in the trim chit by means of the test-cocks on the rear doors of tubes Nos. 5 and 6. On testing, "a small amount of water slopped out of" No. 6; as to No. 5 "no water came out at all." He then went to the control room, and asked Lieutenant Chapman whether tubes Nos. 5 and 6 were not meant to be full. He said "yes." Lieutenant Woods told him that he had found they were not full. Lieutenant Chapman then asked Robinson (Cammell Laird's engineer) if they were meant to be full, and he replied "No." Captain Oram in his evidence says that this conversation took place about half an hour after main tanks had been flooded,

which would fix it as having taken place at about 2.30 p.m. He adds that Lieutenant Woods was told to report upon the condition of tubes Nos. 5 and 6. Lieutenant Woods returned to the tube compartment, and again tested tubes Nos. 5 and 6 with the same result as before. He returned to the control room and asked Lieutenant Chapman "if there was any likelihood of having to fill the torpedo tubes to assist the submarine in getting down" and Lieutenant Chapman answered "yes." He then asked Robinson if the telemotor power (by which the bow-caps are opened and shut) was on, and on receiving a negative answer, he asked to have it turned on. He then returned to the tube compartment and ordered leading seaman Hambrook to open the valves by the opening of which the telemotor power was communicated to all the six bow-caps. All was then in readiness to comply with any order which might come through to fill any of the torpedo tubes. He then asked Hambrook whether the levers by the movement of which, when power is on, the bow-caps are opened and shut, "were in the shut position," and received the answer "yes." He had also asked him "if everything was correct" and had received the answer "yes." I pause here to point out that the words "in the shut position," might mean either that the levers were "at shut" i.e., with the indicator on the lever pointing to the word "shut" on the panel or plate on which the levers were pivoted, or "at neutral" having first been moved to shut and then moved to neutral. In either case the bow-caps would all be closed. Lieutenant Woods however by his question meant the indicator to be pointing to the word "shut." The probability is that Hambrook did what Mr. Williamson told Bucknill J. it was his duty to do, viz., after opening the valves to put the levers to "shut" and then back to "neutral." There can, however in my opinion, be no doubt that the questions meant and would be understood by Hambrook to mean "are the bow-caps shut?" and that Hambrook's answer meant "the bow-caps are shut," and that Lieutenant Woods so understood it and was entitled to rely on Hambrook's answer. One answer given before Bucknill J. makes the position quite plain: "I asked him if it was in the 'shut position afterwards [i.e., after he had reported all correct] and he said it was. When he said it was correct, he meant, 'or I took him to mean that all the bow-cap valves had been opened and the levers were in the 'shut' position.'" While waiting for any further order to come through from the control

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room, Lieutenant Woods determined to inspect the inside of the tubes to see if there were any small leakages through the rubber settings of the bow-caps. The ship was both partly submerged and under way. The trial judge finds that this inspection was a proper step to take; nor does the Court of Appeal suggest any negligence in the taking of it. Before commencing the inspection Lieutenant Woods went to the forward end of the tube compartment and inspected the bow-cap indicators. He found the pointers all opposite the word "shut." As to this he is quite positive, and his evidence was accepted by the trial judge and by Lord Greene M.R. Goddard L.J. thought that he must have misread the indicator for the bow-cap of No. 5: du Parc L.J. says nothing as to this, and presumably accepts the evidence, but suggests that Lieutenant Woods should have ascertained from Hambrook that the lever for No. 5 was at shut, "just before the rear door was opened." This suggestion prompts the question as to what interval of time in fact elapsed between the inspection of the indicators and the opening of the rear door of No. 5. As to this, while one witness suggested as much as ten minutes, I think that the only reliable and practical evidence is that of Lieutenant Woods himself who did the job, and he puts it at "about three minutes," which allows more than forty seconds for each of the four tubes which were examined, and seems to me an ample estimate.

The crucial question may now be posed. Did Lieutenant Woods throughout the relevant period act with reasonable care, the relevant period being from his inspection of the trim chit to the opening of the rear door of No. 5? In my opinion he did. We have to consider this case on the footing, as to which all parties are in agreement, that the *Thetis* sailed from Liverpool with all the bow-caps shut. On the evidence they were still shut up to three minutes (or thereabouts) before the opening of the rear door of No. 5. Lieutenant Woods was the man in charge of the compartment in which the means of opening the bow-caps were situated. He had not authorized the opening of any bow-cap. He believed and had every reason to believe that they were all shut. One question and answer in his cross examination by Mr. Sellers at the trial seems to sum up the whole position:—"Q. You are going to open the door of the "starboard torpedo tube which if the bow-cap is open or "partially open, would have disastrous results. Do not you "think that it would have been a wise precaution to have put the

"lever over to 'Shut'? A. As long as everything is reported to me as correct, and after my inspection of the bow-cap indicators and relying on the test-cocks being in proper working order, whatever one thinks now as to what one might have done, I think that my actions were fully justified and that they were entirely correct." He relied on three things. As to the levers he was entitled to rely on Hambrook (and Hambrook must have believed the bow-caps to be all shut, or he would not have helped to open the doors); and he was entitled to rely on the indicators. So far as the test-cock is concerned, he used that in the first instance for checking the statement in the trim chit as to the condition of Nos. 5 and 6; but when it came to the question of opening the doors of the tubes, the indicators were the guides on which he relied, although no doubt the choked test-cock on No. 5 in fact confirmed what the indicator had just told him, viz., that the bow-cap of No. 5 was shut. One of his answers to a question by Mr. A. T. Miller at the Inquiry shows his frame of mind. He is being questioned as to the time when he came to open the door of No. 5:—"Q. If this cock were blocked, the tube might be under pressure of water with the bow-cap open or partly open? A. I had checked the bow-cap indicators." The judgment of the Court of Appeal is based on the grounds stated in the following passage from the judgment of the Master of the Rolls (1): "Both on the principle of *res ipsa loquitur*, and, if this were not applicable, then because in my opinion an affirmative case is established, I feel constrained to hold that Lieutenant Woods was guilty of negligence. He failed to give the proper order to Hambrook to put the lever in the closed position and relied in part on the evidence of the test-cock which he ought to have known was never intended to be relied on for such a purpose and was in any case wholly unreliable unless the rimer was used." My Lords, assuming that the principle of *res ipsa loquitur* applies, and establishes that *prima facie* Lieutenant Woods must have been negligent, it is open to him to prove affirmatively (as in my opinion, he has) that he did throughout exercise reasonable care. The principle does not involve this—that, notwithstanding that affirmative proof, he must be held to have been negligent, unless he can solve the mystery and prove how the bow-cap came to be open at the critical moment. As to the alleged failure to give the proper order to Hambrook, he took, in my opinion, the necessary and

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as for *res ipsa loquitur*, no need to show how it happened, but when a negligence

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proper steps to ascertain from the man, on whose answers he was entitled to rely, that all the bow-caps were shut. As to the test-cock, the fact that no water emerged in the process of opening the door of No. 5, did confirm what Hambrook and the indicator had already told him. I am not prepared to hold that in the circumstances he was negligent in not using the rimer. Its use formed no part of the drill in regard to the opening of rear doors. He had never in his experience known a test-cock to become choked. Indeed such a hermetical sealing as occurred in this case, preventing any percolation of water, must be unprecedented. He was entitled to assume that the test-cock was in order when the ship sailed from Liverpool with all the bow-caps closed. For the reasons which I have indicated I am of opinion that the appeal of Lieutenant Woods should succeed.

As regards the cross-appeal against the widow of Hambrook, I can see no evidence on which a case of negligence against Hambrook can be based. That cross-appeal must fail. As regards the cross-appeal against Cammell Laird and Co., Ltd. (hereinafter referred to as Cammell Laird's), I am of opinion that it fails. The Court of Appeal exonerated them from liability on the ground that, accepting the view that they were negligent in failing to detect the obstruction in the test-cock, their negligence was not the cause of the accident. With this view I agree. It is true that if the test-cock had revealed the presence of water in No. 5 when Lieutenant Woods turned it up as a necessary preliminary to opening the door, he would have refrained from opening it, just as he had refrained from opening the door of No. 6. To that extent the condition of the test-cock led to the disaster. But notwithstanding that condition of the test-cock, had the bow-cap been shut when he opened the door no disaster would have occurred. From the common sense or any other point of view the cause of the accident was, in my opinion what might be termed the double event, viz., the opening of the door when the bow-cap was open. But assuming that Cammell Laird's were negligent and that their negligence caused the accident, the question would still remain whether they were in breach of a duty owed to Duncan and Craven. The answer to this question depends upon whether they could reasonably be expected to foresee that the choking of the test-cock might endanger the lives of those on board or cause the event which happened. In my opinion no such foresight could reasonably be expected of them. The function of

the test-cock was to assist in firing operations, and to indicate (after a torpedo had been fired and the bow-cap closed) when the water in the tube had, by draining, sunk below the halfway level, so that the remaining water could, by opening the door, be quickly emptied into the compartment and thus enable the tube to be at once reloaded. In such circumstances any obstruction must at once be detected and removed. But on this occasion the ship was being sent out by Cammell Laird's on a diving trial, when no torpedo would be fired. It was a trial in regard to which, in my opinion, no one could reasonably be expected to foresee, or indeed could possibly foresee, the happening in the course of it of the only event which could make the faulty test-cock responsible for the disaster, viz., the opening by the officer in control of the tubes and their bow-caps, of the rear door of a submerged tube when its bow-cap was open. If this view is right, as I think it is, Cammell Laird's are under no liability to the plaintiffs. While I have dealt with this matter briefly I would like to say that I have had an opportunity of reading the opinion of my noble and learned friend Lord Simonds and agree with it. As to the case against Wailes Dove Bitumastic, Ltd., if Cammell Laird's are under no legal liability, neither can they be subject to any. I will only add this. The fact that no one can be made liable to the plaintiffs for the damages which flowed from this disaster is, I doubt not, due to the deaths of so many people, among whom might have been found the person capable of solving the mystery of how the bow-cap came to open during the inspection of the tubes. To me it remains a mystery, and no good purpose can be served by suggesting possibilities which have no foundation in the available evidence.

LORD MACMILLAN. My Lords, in expressing my agreement with the unanimous conclusion at which your Lordships have arrived I propose to confine myself to the broad considerations which emerge from the analysis of the facts and arguments which your Lordships have just heard from my noble and learned friend on the woolsack. The lamentable disaster which befell the *Thetis* on her diving trials was occasioned by the opening of the rear or interior door of torpedo tube No. 5 while the bow-cap of the tube was not closed. There was consequently an inrush of the sea through the tube which filled the forward compartments of the vessel and prevented her from regaining the surface. Despite the searching investigation,

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official and judicial, to which the circumstances of the calamity have been subjected, it has proved impossible to ascertain some of the most crucial facts, and exactly what happened must now remain a mystery for all time. It is not the task of this House to find an answer to the problems which the loss of the *Thetis* presents. The question for this House in these appeals is limited to one aspect of the matter, namely, whether on the evidence adduced enough has been established in fact to bring home liability in law to the defendants or any of them for the death of two of the men who lost their lives in the disaster. The liability, if it exists, is in tort, that is to say, for failure to observe a duty of care owed by the defendants to the deceased, which failure the defendants knew, or ought to have known, might result in the jury or death of the deceased.

As regards Lieutenant Woods, I share the view of all your Lordships that no case of negligence as I have defined it has been made out against him. In substance the allegation against him is that he opened the internal door of the torpedo tube without taking due care to make sure that the bow-cap was closed and thus let the sea into the vessel. There were in all six torpedo tubes, arranged in two vertical tiers of three each, and between the tiers there was an upright panel with six dials, one applicable to each tube. The dial applicable to No. 5 was the lowest on the panel. These dials were mechanically related to the bow-caps and showed for each tube whether the bow-cap was open or closed. There is no suggestion that they were in any way out of order. Before Lieutenant Woods opened the rear door of No. 5 tube he inspected the dial of the mechanical indicator and observed that it showed the bow-cap to be closed. Goddard L.J. suggests that he was mistaken in his reading of the dial, but Lieutenant Woods gave confident evidence that the indicator when he consulted it showed that the bow-cap was closed and, subject to Goddard L.J.'s doubt, his evidence has been accepted as accurate. No one has suggested that he was other than a sincere and trustworthy witness. The vessel was equipped with this mechanical indicator for the express and sole purpose of showing whether the bow-caps of the tubes were open or shut. It was the safeguard provided against the opening of the rear doors of the tubes when the bow-caps were open, and on the information which it gave those in charge of the torpedo tubes were entitled to rely. Lieutenant Woods thought it right in the course of his duty to inspect the interior of No. 5 tube. To do this he had to open the rear door of the tube.

Before opening the rear door he consulted the indicator, which informed him that the bow-cap of No. 5 tube was closed. He had taken the required precaution and in my opinion that is sufficient to absolve him from blame. But in point of fact when he opened the rear door of the tube the bow-cap was open. Something must have happened in the brief interval of a few minutes which elapsed between his inspection of the indicator and his opening of the door. But what happened to cause the opening of the bow-cap in the course of these few minutes will never be known, and there has only been conjecture but no evidence to fill the gap. It has not been suggested that Lieutenant Woods was negligent in not again consulting the indicator before the actual moment of his opening the door. It has been said, however, and indeed the Court of Appeal has held, that Lieutenant Woods, though he had the assurance of the indicator that the bow-cap was closed, was nevertheless negligent because he also relied on another source of information which he did not properly operate. On the rear door there is a lever the raising of which is the first stage in the opening of the door. When the lever is half raised it brings an orifice in the shank into alinement with an orifice in the door so as to open a cock communicating with the interior of the tube. The lever and cock are placed half way up the door. The result is that if the tube is more than half full of water the operator will be warned that this is so when he takes the first step to open the door, for water will flow out through the cock when the lever brings the two orifices opposite each other. Lieutenant Woods apparently twice used this test to see if the tube was full of water, a matter as to which some doubt had arisen. On both occasions no water came out. The reason was that the orifice in the door was clogged with paint. He did not know this and had no reason to suspect anything of the kind in a new vessel which had been inspected and certified as in good and safe order for her diving trials both by the builders and by the Admiralty officials. Attached by a chain to the lever was a probe or rimer for clearing the opening of the cock should it become clogged, and it is said to have been negligent of Lieutenant Woods not to have used the rimer which, if he had used it, would have told him that the cock was blocked and not in a condition to inform him whether the tube was more than half full of water. But the use of the rimer was no part of the routine drill in opening the door. It was there to be used if needed, and Lieutenant Woods had no reason to suspect that

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it was needed. To my mind the incident of the blocked test-cock and Lieutenant Woods' actings with regard to it are really irrelevant to the issue of his negligence. The test-cock was not provided for the purpose of giving warning when the bow-cap was open. Its purpose was to indicate whether the tube was more than half full of water. If the tube were full of water, whether the bow-cap were open or shut a jet of water under pressure would be projected through the cock, though no doubt if the bow-cap were open the jet would be under greater pressure and projected further. The two questions whether the tube was full of water and whether the bow-cap was open or shut are quite distinct. The cock was the proper means of ascertaining the answer to the former question; the mechanical indicator was the proper means of ascertaining the answer to the latter question. All that can be said is that if he had used the rimer and cleared the passage a jet of water under pressure would have issued from the cock, in which case he presumably would not have opened the door. Assuming that he did not do all that he might have done in using the test-cock, which was not intended to indicate whether the bow-cap was open or shut, I do not see how this can be imputed to him as negligence causing the disaster when he had duly consulted the indicator on which he was intended to rely for information as to the state of the bow-cap and which had informed him that it was closed. I would only add that before opening the door he received a further assurance from Hambrook, the experienced rating who was attending to the levers which operate the bow-cap, that it was all right. As to Hambrook himself, the case against him finds no support in the evidence.

I pass to the case against the builders, Cammell Laird & Co., Ltd. This depends entirely on the clogging of the test-cock. The painting of the inside of the tube had been done by sub-contractors, Wailes Dove Bitumastic, Ltd., who had been recommended to them by the Admiralty. The painter who actually did the job carelessly allowed the paint to fill up the hole in the door and so put the test-cock out of action. For this piece of carelessness on the part of the sub-contractors' workman Cammell Laird & Co., Ltd., are no doubt responsible to the Admiralty as for a breach of contract. But it is a very different matter to hold that they are thereby rendered liable in tort for the disaster to the *Thetis*. It was the duty of the Admiralty inspectors to look for and detect any piece of bad workmanship, but they never observed, any more than did

the officials of Cammell Laird & Co., Ltd., that the hole was blocked by paint. While this does not relieve the builders of their responsibility for the defect, it is significant on the issue of their negligence. Where the case against them breaks down is in the connexion of their failure to observe and remedy this defect with the occurrence of the disaster. Can it be said that they ought to have foreseen as reasonable people that, if they failed to detect and rectify the clogging of the hole in the door, the result might be that the naval officer in charge of the tubes at the diving trials might, in order to satisfy himself that the bow-cap of No. 5 was closed, place reliance not exclusively on the mechanical indicator which they had provided for the purpose but also on the action of the test-cock, which they had not provided for that purpose? Or that the bow-cap might, for some reason which has never been explained, be open when he opened the door, although it was closed when he consulted the indicator? Or, in short, that the clogging of the hole might cause the loss of the vessel and her crew? The chain of causation, to borrow an apposite phrase, would appear to be composed of missing links. The case against the Bitumastic Company fails even more signally for the same reason. I accordingly agree with the motion proposed by my noble and learned friend on the woolsack.

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LORD PORTER (read by LORD SIMONDS). My Lords, the facts in this case have been fully stated and I need not repeat them. The plaintiffs are the widows of two men employed by two of the contractors who worked on the *Thetis*. Mr. Craven was employed by Cammell Laird & Co., Ltd., and Mr. Duncan by their sub-contractors Wailles Dove Bitumastic, Ltd. During the voyage on which that ship was lost both were throughout engaged on their work abaft the control room and therefore at the opposite end of the ship to the compartment where the tubes were placed. The four defendants against whom the action was continued in your Lordships House were : (i.) Lieutenant F. C. Woods ; (ii.) Leading Seaman W. L. Hambrook ; (iii.) Cammell Laird & Co., Ltd. ; (iv.) Wailles Dove Bitumastic, Ltd. I propose with your Lordships' permission to consider their cases individually and in that order.

Lieutenant F. C. Woods was said to be negligent by one Lord Justice (now Lord Goddard) because he had misread the indicator or read that connected with the wrong tube, and by all (a) because he had relied upon the test-cock and failed to give

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a definite order to Leading Seaman Hambrook to put the levers controlling the bow-caps in the closed position before opening the rear doors of the tubes, and (b) because he had relied at least in part upon the test-cock for a purpose for which it was not intended, viz., to see if the bow-cap was open and that without using the rimer. As to Goddard L.J.'s view, I agree with Lord Greene M.R. and du Parc L.J. in thinking that it would not be right for an appellate tribunal to override the view of the trial judge, who alone saw and heard the witness, and could, as no other person or body can, determine his reliability and the accuracy of his memory. Lieutenant Woods was obviously a scrupulously truthful witness and the learned judge had no hesitation in accepting his account of his actions before he opened the rear door. In a skilled operator the reading of the indicator must be almost instinctive. Moreover a failure to observe correctly what it indicates would endanger the lives not only of the lieutenant himself, but of the rest of the crew and the working party on board, and even if he might have risked the first he was not likely to endanger the second. As to the necessity or desirability of giving a direct order to put the bow-cap levers into the closed position, a somewhat modified contention was presented to your Lordships. It was not maintained that a definite order was necessary, it was conceded that a specific inquiry would have been enough. If the finding of the learned judge ought (as I think it ought) to be accepted Lieutenant Woods did ask Hambrook if all was correct. There is no finding that he also asked if the levers were shut, a question which when giving evidence at the inquiry, he thought he put, but of which apparently he was not certain at the trial of the action. But the question he actually put, should and would have indicated to Leading Seaman Hambrook that the levers were required either to be at shut or to be at neutral after having been placed in the shut position. It is no doubt true that there were two schools of thought amongst those conversant with submarines as to the propriety of placing the levers at neutral when diving—one school saying they should always be in the shut position, the other that it was correct practice to put them at neutral. The second method has certain advantages at any rate when the vessel is in action, since to place the lever at neutral locks the pressure in the tube from the point where the levers are placed up to the bow-cap itself and prevents it from ceasing to be effective if the pipes carrying the oil pressure behind that point are punctured. Having regard to this diver-

gence of view it was not in my opinion negligent to follow the alternative course and set the levers at neutral or to ask if they were all correct instead of asking if they were at shut. Holding this view, I do not think it necessary to decide whether Lieutenant Woods' further question "Are the levers parallel?" was asked before or after the disaster. I am inclined to agree with the learned judge that it was asked after the rear door had been opened, but I think the point immaterial. The other matters upon which the Court of Appeal have stressed are that reliance was placed upon the test-cock and the failure to use the rimer. "I feel constrained to hold," says the Master of the Rolls (1), "that Lieutenant Woods was guilty of negligence. He failed to give the proper order to Hambrook to put the lever in the closed position and relied in part on the evidence of the test-cock which he ought to have known was never intended to be relied on for such a purpose and was in any case wholly unreliable unless the rimer was used." This, with all respect, is to lay too great stress upon the reliance which Lieutenant Woods placed upon the evidence of the test-cock. Primarily he relied upon his inspection of the indicator, which was the instrument placed in the submarine for the purpose of ascertaining whether the bow-cap was closed or not. If he had done no more than inspect it and found it at closed I should not hold him guilty of negligence and I agree with both courts below in thinking a further inspection immediately before or in the course of opening the rear doors was not called for. No doubt the test-cock is meant to show whether the tube is more than half full of water and not whether the bow-cap is open or not. But when the officer in charge has already done all that he was bound to do I see no evidence of negligence in his reassuring himself by other means, even if those other means are only partially reliable and are not primarily adapted for that purpose. But indeed, unless the test-cock is itself blocked up it is no bad indication that the bow-cap is not open. If it were open, water must flow through it and if water does not flow through it the bow-cap cannot be open. There remains, however, the failure to use the rimer. If I am right in thinking that Lieutenant Woods would have shown due care had he confined his observation to the indicator, it cannot be negligent that he did not take every precaution in respect of the test-cock. Moreover, it was no part of the drill to rime and primarily I think the rimer is meant to deal with partial blocking by foreign

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substances entering through the bow if the tubes are used for discharging torpedoes, or through the tanks if the tubes are filled through them. The ship had just come from the hands of the builders, was supposed to have been inspected by the owners and by the Admiralty overseers, and even Cammell Laird's foreman-painter did not believe that the enamel could flow in and block the hole in the test-cock. No doubt the rimer ought to be used from time to time to see that the orifice in the test-cock is kept clear, but not necessarily on every occasion. In particular it was not provided to deal with obstruction created in the course of preparing the ship for sea nor was there any reason why the existence of such an obstruction should have been suspected when she set out on her diving trial.

The Court of Appeal have, however, put the blame on Lieutenant Woods for a more general reason. "The case "against these two defendants" (i.e. Lieutenant Woods and Leading Seaman Hambrook), says the Master of the Rolls (1) "can, I think, be founded upon the doctrine of *res ipsa loquitur* "since Lieutenant Woods was the officer in charge of the tube "space, he was in sole control and an accident happened which "in the ordinary course of things would not have happened, "if he had used proper care." This method of approach is founded upon the well-known statement of Erle C.J. in *Scott v. London & St. Katherine Docks Co.* (2): "There must be "reasonable evidence of negligence. But where the thing is "shewn to be under the management of the defendant or his "servants and the accident is such as in the ordinary course of "things does not happen if those who have the management "use proper care, it affords reasonable evidence, in the absence "of explanation by the defendants, that the accident arose "from want of care." The difficulty I find in applying this doctrine to this present case is that Lieutenant Woods has given an explanation which has been accepted by the learned judge, and even if he had not, the presence of the contractors' men and indeed the possibility that his subordinates did not obey his orders or took action without them must not be ruled out. No doubt naval ratings may be expected to wait for and to obey the orders of their officers but it has to be remembered that they are not the servants of their officers but of the King and a naval officer cannot be held liable for negligence merely because the ratings under him are negligent without or contrary to his orders. Moreover Lieutenant Woods was not in fact in

(1) 171 L.T. 186, 195.

(2) (1865) 3 H. & C. 596, 601.

sole control. Cammell Laird's men were also on board, and it is not certain that they may not have taken some action. I doubt whether in the circumstances, if Lieutenant Woods had lost his life, it would have been possible to hold him guilty of negligence, but when his evidence has been given and the judge who tried the case has absolved him, the question, as I see it, is, not does the accident of itself point to his negligence, but is it right on the evidence as a whole to find him guilty of negligence?

I have given reasons why I do not think it right to do so in his case and now turn to that of Hambrook. Against him the case is put that some one must have opened the bow-cap by accident or by design; that the most probable wrongdoer was Hambrook who was standing by the levers and taking his orders from Lieutenant Woods; that an earlier opening was not possible, since it was the case of all parties that the bow-cap was closed when the vessel left Birkenhead and remained closed until the power was put on shortly before the rear door was opened: that the moving of the levers accidentally by a possible intruder was unlikely because (a) no one was observed (b) the space was narrow and it would be difficult for anyone to get to the levers unseen and improbable in any case that anyone would go to the position in which they were placed, (c) the naval authorities were in charge and unlikely to let anyone other than one of themselves get to the spot, and (d) once the power was on the levers are difficult to move and it would be most improbable that they could be moved without the knowledge of the man who did it. Against this must be set the fact that Hambrook was a man of many years of experience, placed to manipulate the levers because of his skill and that he was specifically asked if everything was all correct, and replied that it was. Anyone may, of course, make a mistake but to impute error to Hambrook is to indulge in speculation rather than to draw a legal inference particularly when one remembers that one of Cammell Laird's men was also standing by the levers and that Cammell Laird were to manipulate the auxiliary machinery, whatever may be included under that term. To impute negligence however to Cammell Laird's employee would in my view be equally speculative and unjustified as to impute it to Hambrook. It is true that the opening of the bow-cap is difficult to explain without some negligence somewhere, but this is not a justification for concluding that Woods or Hambrook was the guilty party. Indeed, if Goddard L. J.'s view were to prevail, both must have been guilty

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of negligence—Hambrook in putting one lever to neutral after putting it to open or at any rate in failing to put it to shut before putting it to neutral, and Woods in faulty observation of the indicator. If either Woods or Hambrook were in error one would naturally expect all the bow-caps to be open not one, since an order to deal with one lever in a manner different from that in which the others were to be dealt with would be an unlikely order and to treat one of the levers in that way without an order would be an unlikely mistake. The single error is, if anything, more consistent with the theory of an accidental displacement of the lever by someone other than those engaged in manipulating them.

If neither Woods nor Hambrook are to blame it is said that either Cammell Laird or the Bitumastic Company must be : Cammell Laird because they were the employers of the Bitumastic Company who applied the enamel, were in control of the ship until the very last moment before the actual attempt to dive, if not until the end, and should have inspected the work and discovered the blocking of the test-cock : the Bitumastic Company because they were the actual painters responsible for that blocking. I have no doubt that both companies were negligent, the one for failing to inspect the rear door properly after the painting was finished and the other for faulty painting. They are not accused of bad painting, however, but of endangering the lives of those on board the ship and in particular of two men who were not in the tube compartment. Were they then in the first place guilty of negligence towards any of the men in the vessel and in the second towards the husbands of the two plaintiffs ? The answer depends upon whether they ought to have foreseen the possibility of injury to any of these persons by reason of the blocking of the aperture in the test-cock. The Court of Appeal said that their action was not the cause of the loss ; the disaster was due to the open bow-cap and that alone. It is true that the blocked test-cock was not the sole cause but it was *a* cause and that is enough if the cause in question was a direct one. Unless the test-cock had failed to flow Woods would not have opened the rear door. The actual cause of the loss was the opening of the rear door when the bow-cap was already open. What then led to the opening of the door in these circumstances ? Surely the blocking of the test-cock. Suppose a direct question to have been asked of Cammell Laird “ Is the tube more than half full of water ? ” and they had answered “ No ! ” Would not Woods have been entitled

to assume that that answer confirmed his observation of the indicator and to argue, as in fact he did argue, that the bow-cap was not open, or perhaps, as I imagine more nearly represents his actual state of mind, to think it safe to open the rear door because the tube was less than half full. The cause of the loss or at any rate a cause was the action of Lieutenant Woods induced by the condition of the test-cock. The case seems to me to have some analogy to the scuttling cases of which *P. Samuel & Co., Ltd. v. Dumas* (1) is an example. The entry of sea water through the open bow-cap was the cause of the loss in this case as its entry through the open sea-cocks was in those. What led to that opening was in one case human volition and in the other the blocking of the test-cock and that blocking was a cause of the loss in the one case just as the opening of the sea-cocks was in the other. So too a railway collision is directly caused by the impact of two trains, but it could hardly be denied that a faulty signal was one cause and perhaps the most vital one.

Both companies then in my view were negligent in respect of this careless painting of the rear door and their failure to detect the blocking of the orifice of the test-cock by a proper inspection. But negligence in failing properly to paint a ship is not necessarily negligence towards all or any of those on board her. The two companies no doubt owed a duty to all the ship's company, both naval ratings and civilians, but would only be guilty of want of care towards them if the act or omission complained of would reasonably be anticipated as likely to cause them harm. No question of measure of damage arises here, as arose in *In re Polemis & Furness Withy & Co., Ltd.* (2) Your Lordships are concerned with the earlier question whether these defendants were negligent towards the two men whose widows are making a claim—a question similar in character to that discussed in *Hay* (or *Bourhill*) *v. Young* (3). Ought then Cammell Laird or the Bitumastic Company to have anticipated that the blocking of the test-cock would be an element of danger to any one on board the ship and to these two men in particular? I think not. It is true that Cammell Laird were builders of submarines and had constructed others of a similar type to the *Thetis*. But they had nothing to do with the torpedo tubes or their fittings. All they had to do with them was to fasten them in their proper place. There is

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(1) [1924] A. C. 431.

(3) [1943] A. C. 92.

(2) [1921] 3 K. B. 560.

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nothing to show that they knew or had reason to know of the purpose for which the test-cock was required. It created no anticipation of danger in itself and even if they had known of its object, they would not have anticipated its use for a purpose, for which as the Court of Appeal say it was not intended, namely, to see if the bow-cap was open or not. They might, if they knew its use, expect it to indicate whether the tube was more than half full of water, and in that case ought to have foreseen that the rear door might be opened so as to let a tubeful of water into the forward space instead of half a tubeful at most. But I do not think this should have led them to suspect injury to anyone though it might have made the compartment more uncomfortable whilst the water was draining away. But whatever effect it might have on men in the forward space, it would not be thought to affect or endanger men abaft the control room, where the two men, for whose loss the action is brought, were. Moreover the enamelling was subject to inspection by the Admiralty overseer and if he did not suspect any danger I do not see why either of the two companies should do so. He, no doubt, like them, was negligent in failing to detect careless painting, but he had at least as much if not more reason to foresee danger to the men on board than they had, yet he did not do so. To-day everyone would be on the alert, but before the disaster to the *Thetis* there was no reason to imagine so unsuspected a result. As in the case of Lieutenant Woods, the plaintiffs relied upon the doctrine *res ipsa loquitur* so in the case of Cammell Laird they contended that the principles laid down in *Donoghue v. Stevenson* (1) made their claim good. Those defendants, they said, had put into the hands of the naval personnel a vessel which was in fact in a state such as to endanger the lives of those on board, and therefore must be liable for the loss of lives which were so endangered. No doubt this would be true if the defendants ought to have foreseen the blocking of the test-cock as a potential danger. But inasmuch as in my view no such danger should have been anticipated the doctrine does not apply. Reliance was also placed on the argument that Cammell Laird were, at all material times, and particularly at the last moment at which men could have left the submarine, in control of the vessel and that the men whose death gives rise to the claim now in question were accordingly in the position of invitees whose representatives could rely upon the principles established in

(1) [1932] A. C. 562.

Indermaur v. Dames (1), and expressed in the words of Willes J. in delivering the judgment of the court. He says: "with respect to such a visitor at least," (i.e. an invitee) "we consider it settled law, that he . . . is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know." Even therefore if the plaintiffs' husbands were invitees and Cammell Laird were in control at the material time, still the duty of an invitor is only to use reasonable care for the safety of his invitees, and in my view they exercised all proper care for that purpose. The answer to the broad issue is that to prove their case the plaintiffs must establish negligence towards those whom they represent and in my opinion they have not done so. It will be observed that I have said nothing as to common employment. If I am right in the view I take that consideration does not arise. I would allow the appeal of Lieutenant Woods and dismiss those against Hambrook, Cammell Laird and Wailes Bitumastic Ltd.

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LORD SIMONDS. My Lords, the facts in this case have been fully stated by my noble and learned friend Lord Simon, and I need not repeat them. I will add first a few words upon the question of the liability of Lieutenant Woods. I will assume against him, though I doubt whether the assumption is justified that this is a case in which the principle of *res ipsa loquitur* may be applied. But to apply this principle is to do no more than shift the burden of proof. A *prima facie* case is assumed to be made out which throws upon him the task of proving that he was not negligent. This does not mean that he must prove how and why the accident happened: it is sufficient if he satisfies the court that he personally was not negligent. It may well be that the court will be more easily satisfied of this fact if a plausible explanation which attributes the accident to some other cause is put forward on his behalf; but this is only a factor in the consideration of the probabilities. The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered: yet, if the court is satisfied by his evidence that he was not negligent, the plaintiffs' case must fail.

My Lords, in this obscure and difficult case one thing emerges clear. It is that Lieutenant Woods, a witness of whom the learned trial judge said (2) that "where he is certain in his

(1) (1866) L. R. 1 C. P. 274, 288. (2) (1943) 77 Ll. L. Rep. 26, 44.

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“own mind he is reliable,” was very sure that, when he looked at the bow-cap indicator of No. 5 torpedo tube, it pointed to “shut.” Having read and read again the evidence given by him at the inquiry and the trial, I see no sufficient justification for rejecting the learned judge’s finding of fact upon this part of the case. It follows that, when Lieutenant Woods examined the indicator after the power had been turned on and after Hambrook had manipulated the bow-cap levers, the bow-cap was shut. Though, as we know, within a short time it was open, or at least began to open, Lieutenant Woods had performed the essential act of examining the indicator and found the bow-cap shut. If so, it surely follows that, apart from the questionable act of leaving the bow-cap levers in the neutral instead of the shut position, the operation performed by Hambrook under the orders of Lieutenant Woods was not open to criticism. The bow-cap could not have been shut, as the indicator showed that it was, unless the levers had been in the shut position before being placed and left in the neutral position. I can see no valid reason for saying that Lieutenant Woods should have given any other order or made any other enquiry of Hambrook. That was done which should have been done: the power being turned on, the levers were at “shut” before they were at “neutral.” It is true that there was some criticism of what I must assume was Hambrook’s final act, the bringing of the levers to the neutral position when the power was on. But here I am content to adopt the language of the learned judge who said (1): “If one thing more than another “transpired from the evidence it was that there are two schools “of thought as to the utility and desirability of the neutral “position.” The evidence fully justified this finding. Finally, my Lords, the case against Lieutenant Woods has been based on the allegation that he was negligent in that he failed to use the rimer to clear the aperture in the test-cock of the rear door of No. 5 tube. This part of the case against him is closely linked with the case against the other defendants, Cammell Laird & Co., Ltd. and Wailes Dove Bitumastic, Ltd. (whom I will call “Cammell Laird” and “the Bitumastic Company”). It is said that the function of the test-cock is to reveal whether the tube is more than half full of water, that it will not perform its function properly if the aperture is blocked, that the rimer is attached to the test-cock in order that the aperture may be cleared, and that to open the rear door without using the rimer

(1) (1943) 77 Ll. L. Rep. 26, 44.

to see that the test-cock was operating properly was an act of negligence, which caused the disaster and for which Lieutenant Woods must bear the responsibility. I will at a later stage try to show why this statement puts in a wrong perspective the function and use of the test-cock, but so far as Lieutenant Woods is concerned I think it sufficient to say (agreeing with and adopting the language of the learned judge (1)) that nothing in his previous experience had suggested to him that it was not safe to rely on a test-cock or to open a rear door until a rimer had been used. He had never known the test-cock to be blocked, and the use of the rimer had not then been incorporated with the drill governing the opening of the rear doors, a circumstance pointing almost irresistibly to the conclusion that it was not regarded as a normal safety precaution. I think that the learned judge rightly declined to regard the failure of Lieutenant Woods to use the rimer as an act of negligence. I have said that Lieutenant Woods can by an affirmative proof that he was not negligent discharge the burden that lies upon him without satisfying the court how otherwise the accident happened, and I think that he has done so. But, if it had been necessary that some other plausible explanation should be offered on his behalf, I should not lightly disregard the possibility of No. 5 lever having been moved from the neutral position to the open position and back again to neutral after the inspection of the dial indicator. Such movement might have been deliberate, as the learned judge found (2) "not impossible," or an act of carelessness by a person unknown who knocked No. 5 lever to "open" and then pushed it back again, an explanation which appeared to commend itself at the inquiry to a very experienced witness, Commander Edwards. But these are speculations which, in view of Lieutenant Woods' own evidence, I find it unnecessary to pursue. I need add nothing in regard to the case against the personal representative of Hambrook. I agree with your Lordships that the claim made against him rests on suspicion and speculation falling far short of proof.

I turn now to the case against the other defendants, and first against Cammell Laird. Your Lordships have not the advantage of a reasoned judgment of the Court of Appeal upon this part of the case. For they found it sufficient to say that, accepting the view that Cammell Laird were negligent in not detecting the obstruction to the test-cock, their negligence in

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(1) 77 Ll. L. Rep. 32.

(2) Ibid. 45.

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that respect was not the cause of the accident. I respectfully accept this conclusion, and it is to be observed that it is a conclusion which depends upon certain facts which are the same whether or not they lead to a finding of negligence in a third party. The cause of the accident was the opening of the rear door of No. 5 tube when its bow-cap was open. There may have been negligence in a third party, as the Court of Appeal held, or there may not, as your Lordships hold. That does not affect the fact that between the act or omission, which is imputed to Cammell Laird as negligence, and the disaster there is the intervening act of opening the rear door when the bow-cap was open. It is the quality of this act which determines the issue, for it is not every intervening act which breaks what is called the "chain of causation." For instance, if I throw a squib into a crowd, I am liable to the man who is hurt, though intervening hands have passed it on. When I speak of the quality of the act, I refer in particular to that aspect of it which I believe to be all important in the consideration of the law of tort, namely, whether it was an act which the original actor could reasonably have contemplated or foreseen. I would emphasize that I am not here considering the question whether the damages are too remote, though there too the question of foreseeability may be vital. But at this stage the question is whether the assumed negligent actor ought reasonably to have foreseen the intervening act and, having foreseen it, to have provided for it or ignored it at his peril. It is, I think, essentially the same question as that which your Lordships resolved in *Donoghue v. Stevenson* (1). For to ask, who is the neighbour to whom I owe a duty in respect of my act, may be in part answered by saying that he at least is not my neighbour who cannot be affected by my act, unless there is some intervening event which I cannot reasonably foresee. It is necessary then to consider what, in respect of the test-cock, was the duty which Cammell Laird owed, not indeed to the Admiralty under their contract, but to the outside world, who might be affected by their acts or omissions. It is important to keep in mind that the liability in contract to the contracting party and the liability in tort to a third party may be very different, though the same act may afford the contracting party an alternative remedy in contract or in tort. Whether Cammell Laird fell short of their contractual obligation to the Admiralty in failing to notice that the aperture of the test-cock was choked

(1) [1932] A. C. 562.

with bitumastic is not here the question. I will assume that they did. But the question is whether they should reasonably have foreseen that that failure would or might result in the disaster that happened, and that in turn, as I see it, depends upon whether they should reasonably have foreseen the intervening act, the opening of the rear door with the bow-cap open. If they should, then they must be regarded as having owed a duty to all persons lawfully on board the submarine, which they failed to fulfil. I would ask your Lordships to observe how nicely this fits in with the law of negligence as it has been developed in *Donoghue's* case (1). There the manufacturer was held to owe a duty to the consumer just because the intervening act of examination was not reasonably contemplated as possible or probable—I do not pause to consider which. That, I suggest, is one aspect of a wider proposition, namely, that the nature of the duty (if any) owed by an actor to a third party depends upon the existence and nature of the acts which should in the actor's contemplation be regarded as reasonably likely to intervene.

My Lords, I will state at once my conclusion and then seek to justify it. It is that Cammell Laird could not reasonably have foreseen the act which led to the disaster, namely, the opening of the rear door with the bow-cap open, and that therefore they cannot be held liable to those who suffered by that act. I do not find it necessary to make a detailed examination of the contract made by Cammell Laird with the Admiralty. I will assume that they broke it. But there is one provision of the contract to which I must refer. It was provided by the first schedule, B., condition 6 (a) that before the vessel left the contractors' (i.e., Cammell Laird's) works for trials at sea or for any other purpose the contractors should complete and forward to the Admiralty certain forms which were scheduled to the contract and further that the contractors should obtain the approval of the Admiralty before the vessel left the contractors' works for trials or other purpose, and the said forms should be forwarded in sufficient time before the proposed date of proceeding on trials to enable the Admiralty to determine whether to grant or refuse such approval. The forms in question were certificates to be signed by Cammell Laird, the first (Form A.) stating that they proposed to carry out a series of trials on the vessel in accordance with the programme attached thereto, that the vessel was already nearly in a condi-

(1) [1932] A. C. 562.

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tion to undertake these trials and that they would forward before the vessel left their premises a certificate to the effect, inter alia, that the vessel was in respect of strength, stability, seaworthiness and every other matter in a fit condition for leaving their premises for the contemplated trials, the second (Form B.) stating that they were about to remove the vessel from their premises in connexion with the programme of trials and certifying that the vessel was in a proper condition to undertake the trials and otherwise as provided by Form A. In accordance with this provision, before the *Thetis* undertook her trials, including the diving trial in the course of which the disaster occurred, both forms were duly completed and forwarded to the Admiralty, and were countersigned by numerous naval officers and other Admiralty officials, the senior executive officer, the engineer officer of the ship, the ship overseer, the district electrical engineer and the naval superintendent of the district. The date upon which Form A. was signed and countersigned does not appear; Form B. was countersigned on April 12 1939, and was in these terms: "We concur that the vessel is in "all respects in a satisfactory condition for leaving contractors' "premises for the purpose stated." The picture that presents itself is a pretty clear one, which is confirmed by the evidence generally. It is of a work which was at every stage closely scrutinized by the Admiralty overseers, whose duty it was to examine every least detail of construction, to take nothing for granted and, above all things, I would suppose, not to ignore any device upon the proper functioning of which the safety of the crew could be assumed to depend. It was after the counter-signature of April 12, 1939, that the torpedo tubes were painted with bitumastic enamel, and that in the course of that work the aperture of No. 5 test-cock was choked; but it is clear that the same vigilant inspection by the Admiralty overseers of any new work was expected and maintained. Yet this aperture was not examined nor discovered to be choked, though the inside of the the tube was itself carefully inspected and gauged. Why not? My Lords, I cannot but think that the failure of the Admiralty overseer to inspect the aperture of the test-cock is easily explicable by a consideration of its proper function. It was, as I read the evidence, intended to serve one purpose only, namely, to indicate in action or, I daresay, in battle practice when the water in the torpedo tube, which had upon the discharge of a torpedo filled with water, had been drained to a point below the aperture in the rear door. When so much of the

water had been drained off, the rear door could be opened and the rest of the water allowed to pour out into the compartment : thus the tube could be reloaded with an appreciable saving of time. This being the function of the test-cock I find it easy to understand why the Admiralty overseer, Mr. Grundy, whose specific job it was to examine the tubes after they had been painted, not only did not look at the hole in the rear door, but regarded it as of so little importance that at the inquiry he said : " I might have looked at the hole, but I am not going to say for certain that I should have done." From this in later answers he to some extent resiled, but I am left with the conviction that he at least did not consider the proper working of the test-cock as a matter of major importance. Yet how could he have regarded it as of anything but the greatest importance if upon it, even as a remote possibility, depended the lives of the crew ? Your Lordships will not forget that the circumstances in which Lieutenant Woods made use of the test-cock were quite extraordinary. It must surely be an event almost unparalleled that the officers in charge of a submarine should not know at any given moment which tubes and tanks are full and which empty. Here there is a mystery about the trim-chit which can never be solved. In the event Lieutenant Woods took a course which can, I think, have been contemplated by nobody : he used the test-cock to see not whether the tube had been drained to half way, but whether it had been filled with water. That that was an improper use of it I do not suggest, but that it was an untemplated use I have no doubt. Let the matter be carried a step further. Considering the proper function of the test-cock, can it fairly be said that Cammell Laird, the Admiralty overseers, or anyone else should have foreseen the possibility not only of its use under such extraordinary conditions, but with the fatal circumstance added that the bow-cap of the tube was open ? Here was a combination of circumstances which could not be foreseen. If so, it follows that, though Cammell Laird may have been negligent in their work, they were not liable to third parties for damage suffered under such circumstances by them. They are, in my judgment, entitled to say that this result they neither did nor could foresee. They may rest under some contractual liability to the Admiralty, though the fitment was not constructed by them and though the painting was not done by them, but there was no duty to third parties to foresee and to prevent such a disaster. The broad considerations which I

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have tried to place before your Lordships are fatal to the plaintiffs' case, whether they invoke the principle of *Donoghue's* case (1) or of *Indermaur v. Dames* (2) or some yet wider principle but I would express my concurrence with the observation of Lord Greene M.R. (3) that there are in any case serious arguments against the applicability to this case of the principle of *Indermaur v. Dames* (2). I do not think it necessary to pursue this matter nor to examine the further defence of Cammell Laird directed to one only of the plaintiffs, viz., the defence of "common employment." The appeal against the judgment in their favour must fail upon grounds common to all the plaintiffs.

It was argued at the Bar that, even if the attack upon Cammell Laird failed, that upon the Bitumastic Company might succeed. I cannot follow this argument. It is true that the carelessness of the Bitumastic Company lay in commission rather than omission. It was their workman who painted over and blocked the hole, and by his own admission he knew, what any man would know, that a hole should not be painted over. But it is not to be attributed to him or to any officer or servant of the company that he ought to have foreseen the consequences of his careless act. It was urged that a painter who paints a torpedo tube and in doing so blocks a hole in its rear door is in a position comparable to that of a man who keeps a dangerous beast and does so at his peril. The analogy is far-fetched and unsound. If a distinction is to be made in principle between things which are and things which are not said to be "dangerous in themselves," I have no doubt into which class a torpedo tube or its rear door or the hole in the rear door should be put. It could not be described as a thing "dangerous in itself." If all that is meant is that a greater degree of care is demanded of a painter when he is painting a ship, and in particular an integral part of the armament of a ship, than when he is painting a garden gate or a drawing-room door, I should not be prepared to dissent from such a vague and general proposition. But that leaves the essential question just where it was. Ought the Bitumastic Company reasonably to have foreseen the possibility of those events happening which in fact happened? The answer is No. Was the intervening act, the opening of the rear door with the bow-cap open, an event reasonably foreseeable by them? The answer is No.

(1) [1932] A. C. 562.

(3) 171 L. T. 186, 192.

(2) (1866) L. R. 1 C. P. 274.

Then let the standard of care demanded of them be what it may, they owed no duty in respect of their careless act to the plaintiffs and cannot be made liable for it to them. In the result the appeal of Lieutenant Woods should, in my opinion, be allowed and the several appeals or cross-appeals of Mrs. Duncan and Mrs. Craven dismissed.

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Appeal allowed and cross-appeal dismissed.

Solicitor for Woods and Hambrook: *Treasury Solicitor.*

Solicitors for Duncan and Craven: *Evill & Coleman.*

Solicitors for Cammell Laird & Co., Ltd.: *Carpenters for Laces & Co., Liverpool.*

Solicitors for Wailes Dove Bitumastic, Ltd.: *Radford, Frankland & Mercer, for Maughan & Hall, Newcastle-upon-Tyne.*

[HOUSE OF LORDS.]

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NO-NAIL CASES PROPRIETARY,

LIMITED

APPELLANTS ;

AND

NO-NAIL BOXES, LIMITED RESPONDENTS.

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Mar. 6, 7,
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Patent—Licence in respect of box-making machines—Provision for minimum royalties based on maximum capacity—Licensor to declare maximum capacity of each machine—Failure to do so—Provision for minimum payment inoperative.

A licensee was manufacturing boxes by means of a patented invention, having agreed to pay a royalty to the licensor under a licence which provided that the minimum amount to be paid by the licensee in respect of each unit of machinery should "never be less than the sum which would be payable in respect of each unit if working at one-half of the capacity of such unit The maximum capacity of each unit shall be declared and guaranteed by the licensor upon installation of such unit from which shall be calculated the full capacity of each unit." No such declaration and guarantee of maximum capacity was ever given:—

Held, that it was an indispensable part of the method by which the minimum royalty was to be ascertained that the licensor should

* *Present* : LORD THANKERTON, LORD SIMONDS and LORD UTHWATT.

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first declare and guarantee the maximum capacity of each unit at the date of installation ; and that, the licensor having failed to do that without which the method could not be operated, the provision for payment of the minimum royalty became inoperative.

Decision of the Court of Appeal [1944] K. B. 629 affirmed.

APPEAL from the Court of Appeal.

The facts, stated by LORD SIMONDS, were as follows : The appellant company (hereinafter called " the licensor ") which commenced business in July, 1931, was a company incorporated in the State of Victoria, in the Commonwealth of Australia, with the object of developing a new process for the manufacture of boxes and containers, in connexion with which it was at all material times the registered proprietor of a number of British letters patent. Before the year 1935 the patented process was being used in Belgium and Holland, and " units," as the machines for manufacturing the boxes were called, were in operation in those countries. In that year it was decided to begin manufacture of boxes by the patented process in England, and for this purpose the respondent company (hereinafter called " the licensee ") was incorporated in England with the object of buying machines for making nailless boxes and operating them in England under a sole licence from the licensor. There was a close connexion between the licensor and the licensee. The licensor in the first place had a large financial interest in the licensee : it acquired 40,000 shares of 1*l.* each in its capital and at all material times retained 35,000 of them. In the second place, of the six members of the licensee's board of directors three, Mr. Van den Bogaert and two others, were also directors of the licensor, Mr. Van den Bogaert being managing director of both companies from 1935 to 1938. Both companies occupied the same registered office. There were other close ties between them. On July 5, 1935, the deed of licence between the licensor and licensee was executed, out of which the present dispute arose. By the deed, after certain recitals from which, amongst other things, it appeared that a unit for the manufacture of the patented products (thereinafter referred to as " No. 1 unit ") had been made for the licensor in accordance with the patented inventions by Messrs. Bohm and Kruse, of Bremen, Germany, and that this unit, which had been successfully operated by a Dutch firm near Amsterdam, was then with Bohm and Kruse for the purpose of effecting renovations, modifications and improvements thereto, on

completion of which it would be available for commercial usage, and that a further unit similar to No. 1 unit, but of larger capacity and incorporating the latest improvements, had been constructed by Bohm and Kruse and was then being successfully operated in full commercial production by the same Dutch firm under licence from the licensor, and that with a view to the exploitation of the British market the licensor had ordered a further unit (hereinafter referred to as the "No. 4 unit") from Bohm and Kruse similar to that last referred to, which it was anticipated would be available for delivery about September 13, 1935, the licensor granted to the licensee full licence and authority to use any unit or part thereof supplied in accordance with the terms of that deed and to sell the products manufactured by means of any such unit anywhere within the licensed territory as therein defined, and elsewhere as therein provided during the continuance of that licence. The deed further provided by cl. 1 that in part consideration for the licence the licensee should pay to the licensor the sum of £40,000 in cash, and by cl. 2 that the licensor should instal and erect in working order at the works of the licensee as therein mentioned No. 1 unit upon the terms therein stated. (It was agreed between the parties that nothing turned on this clause.) By cl. 3 it was provided that the licensor would sell and the licensee purchase No. 4 unit for 11,000*l.*, payable as to one half on the execution of the deed and the balance on the date of installation of this unit at the works of the licensee. The "date of installation" had been previously defined as "the date of the notice in writing which the licensor gives stating that any unit is ready for operation when such unit is ready for operation." Clause 4 made provision for purchase of additional units or parts, and cl. 5 for technical assistance being given by the licensor. Clause 6 provided that the licensee should pay to the licensor during the continuance of the licence, within the time therein mentioned, a royalty of five-eighths of a penny (less U.K. income tax) per double yard of channelled metal strip produced by every unit operated by the licensees as therein mentioned, with a proviso that no royalty should be payable in respect of certain initial production. The relevant terms of cl. 7 were as follows: "Unless the aggregate of the royalties payable by the licensee in respect of each unit operated by the licensee (except No. 1 unit to which no guaranteed minimum royalty shall apply) under the provisions hereof during the

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" first six months following the expiration of one year from
" the date upon which payment of the first monthly instal-
" ment of royalties in respect of such unit commences amounts
" at least to a sum equivalent to that which would have been
" payable if such unit had been operated at one quarter of
" its full capacity the licensee shall pay to the licensor such an
" amount as together with the actual amount paid and/or
" payable shall equal the sum which would be payable in
" respect of such unit if working at quarter of full capacity.
" Similarly for the succeeding six months and thereafter
" during the continuance of this licence in respect of each
" period of six months the minimum amount to be paid by the
" licensee in respect of each unit shall never be less than the
" sum which would be payable in respect of each unit if
" working at one half of the full capacity of such unit
" The maximum capacity of each unit shall be declared and
" guaranteed by the licensor upon installation of such unit
" from which shall be calculated the full capacity of each unit
" based on the amount of double yardage of channelled metal
" strip capable of being produced and affixed to the relative
" boxes cases and containers during a fifty week year of normal
" union working hours with a twenty per cent. allowance for
" fall-off and a further reasonable allowance for fall-off due
" to wear and tear whereby such unit is unable to maintain
" full capacity." The deed contained numerous other familiar
provisions to which it was not necessary to refer. Their
effect was, inter alia, to give the licensee an exclusive licence
within the licensed territory and to debar it from dealing in
the patented products except under the licence. No. 1 unit
was not in fact ever used by the licensee for commercial
production. No. 4 unit was installed in the licensee's works
at Liverpool in the year 1938, and shortly afterwards a further
unit which became known as No. 5 unit was also purchased
and installed. This appeal was concerned only with those
two units. Commercial production of boxes under the licence
was started by the licensee in the year 1938, and by the outbreak
of war in September, 1939, a substantial market for the boxes
had been built up. From that time, however, substantially
the whole of the output of the licensee had been for the service
of agents of the Crown. Until the end of 1941 the licensee
paid to the licensor the royalties provided by cl. 6 of the deed
of licence. But it then ceased to do so, acting on instructions
contained in a letter of December 10, 1941, addressed to it

by the Ministry of Aircraft Production on behalf of the Air Ministry, whereby the said Ministry instructed the licensee to pay no further royalties to the licensor in respect of boxes manufactured for the service of the Crown and authorized it to use any patents so far as such use was necessary in the manufacture of boxes for the service of the Crown. Since December 31, 1941, only an insignificant number of boxes had been made by the licensee for private customers, and only in respect of those has it paid the prescribed royalties. The licensor was not satisfied that the authority of the Ministry, which was given under s. 29 of the Patent and Designs Acts, 1907 to 1939, was effective to release the licensee from its contractual obligation to pay the prescribed royalties in respect of its output, and on August 21, 1942, issued a writ against it, claiming an account and payment of the royalties due to it under the deed. By its statement of claim it indicated an alternative claim to a minimum royalty, but asked for nothing else than an account of royalties due and payable. By its defence the licensee specifically pleaded in relation to the alternative claim that the maximum capacity of each unit operated by the licensee had not been declared or guaranteed by the licensor as provided for by cl. 7 of the deed, nor had the full capacity been calculated as in the said deed provided, and in the premises on the true construction of the deed the provision for payment of minimum royalties had never become effective. To this plea the licensor (pursuant to leave given during the trial) replied that the maximum capacity of each unit operated by the licensee, namely, "nine boxes of a total "unfolded length of eighty inches each per minute or twenty "double yards per minute" was at all material times known to the licensee and the licensor, and was accepted by the parties as having been ascertained by frequent demonstrations of the working of the said units. It further alleged that the licensee never requested the licensor to declare and guarantee the maximum capacity of any such unit upon the installation thereof or at any time thereafter, and upon this foundation pleaded that in the premises the licensee waived any provision of the said deed relating to the declaration or guarantee by the licensor of the maximum capacity of any such unit, and that the licensee was estopped from relying on any such failure by the licensor to declare or guarantee the maximum capacity of any such unit. It further pleaded that upon the true construction of the deed the failure to declare or guarantee

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maximum capacity did not prevent the provision for payment of minimum royalties becoming operative. There was evidence that before the date of the deed of licence the rate of production of nine boxes a minute was demonstrated to the licensee and that before and after the installation of the units at its works they had been inspected by directors of the licensee, some of whom were also directors of the licensor, who timed the rate of production more than once with their watches and found it to be so, when the machine was in perfect working order. Mr. Van den Bogaert said: "It is round about nine a minute, "plus or minus." Atkinson J. rejected the claim for royalties in respect of the whole output but upheld the claim for the minimum royalty. The Court of Appeal rejected both claims. The licensor appealed to the House of Lords but did not pursue the first claim.

Casswell K.C., G. Granville Sharp and Diplock for the appellant company (the licensor). The provisions of s. 29 of the Patents and Designs Acts, 1907 to 1939, did not affect cl. 7 of the deed under which, on its true construction, minimum royalties were payable although the units were in full operation for the production of boxes for the service of the Crown: see also s. 58A of the Acts. The declaration and guarantee by the licensor of the maximum capacity of each unit is not a condition precedent to the liability of the licensee to pay minimum royalties. The maximum capacity was not a matter of doubt and dispute and it is not true that there could be no calculation of the minimum royalties until the maximum capacity had been declared by the licensor. That capacity is a fixed and ascertainable fact and not a mere arbitrary figure to be declared by the licensor. Accordingly cl. 7 meant that the maximum capacity so ascertained (1.) was to be declared and guaranteed and (2.) was the starting point for calculating full capacity. There was a close connexion between these two companies and the maximum capacity was known to both. The obligation to declare and guarantee it was waived by the licensee. Further, the licensee is estopped from relying on the licensor's failure to declare it. The consideration for the minimum royalty was the whole licence and in particular the continued exclusive use of the patent in England. The licensee has forborne to ask for the declaration and the licensor has never given notice terminating the arrangement and now the licensee can at most treat the declaration of maximum

capacity, not as a condition precedent but as a warranty. The real substance of this matter is, however, that it is a commercial contract made in a business atmosphere between commercial men who must be presumed to have assumed that it would be carried out. Accordingly it must be dealt with in that light. [They referred to *Coombe v. Greene* (1); *Besseler Waechter Glover & Co. v. South Derwent Coal Co., Ltd.* (2); *Duke of St. Albans v. Shore* (3); *Campbell v. Jones* (4); and *Ogle v. Vane* (5).]

Sir Walter Monckton K.C., Holmes K.C. and MacKenna for the respondent company (the licensee). The obligation to pay minimum royalties under cl. 7 cannot operate unless maximum capacity has been declared and guaranteed, since there may be doubt and dispute about the maximum capacity of a unit. The licensor did not in the reply raise any question of a new method of ascertaining the maximum capacity having been substituted by agreement for that provided by cl. 7. Waiver cannot create new machinery which is not in the contract between the parties. No estoppel arises. The intention of s. 29 of the Act would be to a great extent thwarted if in cases where the Crown is using a patented invention the patentee could recover minimum royalties as provided for by cl. 7. In construing this agreement cl. 6 should be read as though it had a proviso that no royalty should be payable in respect of anything produced for the service of the Crown under s. 29. Under that section the licensee was acting as agent on behalf of a government department making the patented article for it. [They referred to *P. Samuel & Co., Ltd. v. Dumas* (6); *Doe dem. Sheppard v. Allen* (7) and *Greenwood v. Martins Bank, Ltd.* (8).]

Casswell K.C. in reply referred to *Shirley v. Newman* (9) and *Leather Cloth Co. v. Hieronimus* (10).

THE HOUSE took time for consideration.

Mar. 29. LORD THANKERTON: My Lords, I have had an opportunity of considering the opinions about to be delivered by my noble and learned friends, with which I desire to express my concurrence.

(1) (1843) 10 M. & W. 480.

(2) [1938] 1 K. B. 408.

(3) (1789) 1 H. Bl. 270, 273.

(4) (1796) 6 Term Rep. 570.

(5) (1863) L. R. 3 Q. B. 272.

(6) [1924] A. C. 431, 482.

(7) (1810) 3 Taunt. 78.

(8) [1933] A. C. 51, 57.

(9) (1795) 1 Esp. 265, 266.

(10) (1875) L. R. 10 Q. B. 140.

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LORD SIMONDS. My Lords, in the action in which this appeal is brought the appellants, No-Nail Cases Proprietary, Ltd. (the licensors) sought to recover from the respondents, No-Nail Boxes, Ltd. (the licensees) certain royalties which they alleged to be due to them under a deed of licence dated July 5, 1935. The claim fell under two heads, first for royalties in respect of the whole output of the respondents, secondly, in the alternative, for the minimum royalty provided for by cl. 7 of the deed. The first claim was rejected in both courts below and is no longer pursued; the second claim, upheld by Atkinson J., but rejected by the Court of Appeal, is alone the subject of this appeal. [His Lordship stated the facts and pleadings and proceeded:] Here then were the issues: first a question of construction, and second, if that question should be decided against the appellants, an issue of waiver or estoppel. It is worth noticing that there was no rejoinder. Learned counsel for the respondents assumed (and in my opinion rightly assumed) that no plea was raised by the reply that a new method of ascertaining the maximum capacity had by agreement been substituted for that provided by cl. 7. If it had, he would no doubt have rejoined by pleading the Statute of Frauds. Upon those issues Atkinson J. decided the question of construction in favour of the appellants, but further expressed the view (1) that the declaration and guarantee were at all times in fact waived. Upon both issues the Court of Appeal were against the appellants. The judgment was that of Scott and du Parc L.JJ. by consent of the parties, Luxmoore L.J. having been unable to hear the whole of the argument.

My Lords, to me it is clear that upon the question of construction the decision of the Court of Appeal is right. It is, in my view, an integral and indispensable part of the method by which the minimum royalty is to be ascertained that the appellants shall first declare and guarantee the maximum capacity of each unit at the date of installation. If they do not do so, the agreed method by which alone the liability of the respondents is to be determined cannot be brought into operation. This has been referred to as a condition precedent. It is not, I think, a very happy expression in the context. It is rather that the parties have agreed upon a particular method of defining the liability of the respondents and that, the appellants having failed to do that without which

(1) [1943] K. B. 633, 641.

the method cannot be operated, the provision becomes ineffective. H. L. (E.)

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I turn then to the other issue. Here the appellants rely on certain other facts to which I must now refer. I have already mentioned the close connexion between the two companies, and do not ignore the fact that in such a relationship some degree of informality may well be expected. Beyond that there is the fact that both before and after the installation of the units at the respondents' works they had been inspected by directors of the respondents, some of whom were also directors of the appellants, and it had been ascertained that the rate of production was nine boxes per minute when the machine was in perfect working order. The respondents' directors, it was said, took out their watches and more than once timed the rate and found it to be so. I have said "nine boxes per minute," but this is a loose and inaccurate expression. Mr. Van den Bogaert, whom I have already mentioned, was careful and accurate when, in giving evidence for the appellants, he said: "It is round about nine a minute, plus or minus." I have no doubt that before committing themselves in any way those who were responsible for the respondents' business satisfied themselves as a commercial proposition that the rate of production in the units they were acquiring could be fairly stated as nine boxes a minute when the machine was working to its optimum, and having so satisfied themselves, would so describe the rate in any business communication that they might make. But these facts, upon which the appellants rely as evidence of waiver of the obligation to give a declaration and guarantee, appear to me to be wholly unconnected with that obligation. It has not been suggested that the ascertainment of minimum royalty was discussed or mentioned, and I cannot accept the view that the respondents, because they for one purpose were satisfied with the rate, therefore for another waived the performance by the appellants of their obligation under clause 7. It is relevant to notice two further matters; first that already before the deed of licence was executed the rate of nine boxes a minute had been demonstrated to the respondents, yet the stipulation for declaration and guarantee was inserted; and, secondly (a matter which I have already indicated), it may be well enough to speak of a rate of nine boxes a minute when fractions are unimportant, but where a minimum royalty is determined by the rate, the fractions become important and the difference

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in royalty is substantial, according as the rate is nine boxes in fifty-six, fifty-eight, sixty or sixty-two seconds. It is to my mind clear that the parties never addressed themselves to the question of minimum royalty and that the respondents cannot be held to have waived the performance of an obligation by the appellants which neither of them had in mind. Nor, in my opinion, can any reliance be placed on certain figures prepared in March, 1937, by the accountant for both parties, in which he assumes a minimum royalty determined by a rate of nine boxes a minute. Even if the respondents made no objection to this calculation, I cannot regard it as an abrogation by them of their right to have the royalty ascertained in the manner provided by the deed. In regard to the plea of estoppel, it appears from the judgment of the Court of Appeal(1) that in that court there was a faint suggestion that the respondents were estopped from relying upon any failure by the appellants to declare or guarantee the maximum capacity of the units, but that it was ultimately conceded that this plea could not be maintained. The plea was again formally raised in this House, but it was not supported by any argument which appeared worthy of consideration. The respondents adduced, as they were entitled to do, further reasons why the appeal should in any event be dismissed, but I do not find it necessary to discuss them, as I hold in common with your Lordships that for the reasons already stated the appeal cannot succeed.

LORD UTHWATT. My Lords, under cl. 7 of the agreement of July 5, 1935, the full capacity of a unit is one of the factors entering into the computation of the minimum royalty payable as respects that unit. Unless, therefore, full capacity in the sense in which that word is used in the agreement can be ascertained or unless it has been agreed that, for the purposes of the agreement, full capacity shall be determined in some other way or be taken at a certain figure, proceedings for an account of the sums due in respect of minimum royalty or to recover damages on account of non-payment of minimum royalty must fail. Clause 7 contains at its close the following provision bearing on the ascertainment of full capacity: "The maximum capacity of each unit shall be declared and "guaranteed by the licensor upon installation of such unit" (i.e. a unit in respect of which minimum royalty is payable)

(1) [1944] K. B. 629, 643.

" from which shall be calculated the full capacity of each unit
 " based on the amount of double yardage of channelled metal
 " strip capable of being produced and affixed to the relative
 " boxes cases and containers during a fifty week year of
 " normal union working hours " with certain allowances.
 One may observe on this provision that compliance with it
 would enure as well for the benefit of the licensee as for the
 benefit of the licensor. The licensee would get the benefit
 of the guarantee and the licensor would get the benefit of the
 fixing of the factor necessary for computation of the minimum
 royalty. The licensor was clearly bound to declare and
 guarantee the maximum capacity without being required so
 to do by the licensee, and as the installation of each unit was
 to be the work of the licensor, it could carry out this obligation
 without any aid from the licensee.

The first point taken by the licensor is a matter of the
 proper construction of the agreement. It was argued by it
 that the maximum capacity of any particular unit was ascer-
 tainable as a fact and that the clause provided two things :
 first, that the maximum capacity so ascertained was to be
 declared and guaranteed and, second, that the maximum
 capacity so ascertained was the starting point in calculating
 full capacity. In my opinion the provision is not patient of
 this construction. Maximum capacity is no doubt ascer-
 tainable as a fact. But maximum capacity so ascertained is
 not the maximum capacity referred to in the agreement. It
 is only the maximum capacity as duly declared and guaranteed
 by the licensor that enters into the matter. The language is
 clear, and common sense does not require any departure
 from the language. There is a difference between the two
 conceptions—maximum capacity ascertained as a fact and
 maximum capacity declared and guaranteed. The former is
 open to dispute : the latter is not. There is, further, a com-
 mercial reason for emphasizing the guarantee. Optimism by
 the licensor, while increasing the minimum royalty, would
 open the door to claims under the guarantee : pessimism would
 reduce liability under the guarantee, but diminish the minimum
 royalty. An inducement, therefore, is given to the licensor
 to settle fairly at the outset a disputable matter upon which,
 I apprehend, the licensor might well be supposed best qualified
 to pass an opinion. It is common ground that maximum
 capacity was not declared and guaranteed by the licensor, and
 the licensor is therefore, in my opinion, bound to establish that

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an agreement has been made under which minimum royalty is to be calculated otherwise than in accordance with the terms of the licence. The statement of claim does not allege that any such agreement was made. The reply (delivered pursuant to leave during the course of the trial) does not allege any such agreement. It alleges (1.) that the maximum capacity of each unit—specified at production per minute—was at all material times known to both parties and accepted as having been ascertained; (2.) that as no request to declare and give a guarantee was made by the licensee, the licensee waived any provision relating to declaration or guarantee of the maximum capacity and is therefore estopped from relying upon any failure by the licensor to declare or guarantee it. My Lords, I am content to proceed upon the footing that all the facts alleged in the reply are true. In my view the case of the licensor is not thereby advanced. As regards the first allegation, agreement on a fact which would establish the accuracy of a declaration is not a declaration or a guarantee, and it is not alleged that any agreement on the fact was taken as a substitute for the declaration and guarantee required by the licence. In fairness to the pleader it should be stated that there is no trace in the evidence that there was any such agreement. The parties did not direct their minds to the matter. As regards the second allegation, the absence of a request by the licensee did not preclude the licensor from giving the declaration and guarantee, and in any event a request was not required by the terms of the licence. Why should not the licensee waive the declaration and guarantee specified in the agreement? If it does, how is the licensor thereby prejudiced? All that results from waiver is that the licensee has given up something to which it is entitled. The licensor does not by the waiver lose anything. Waiver of the right to call for the declaration and guarantee does not entitle the licensor to assert that the resulting effect in law is that the declaration and guarantee has in some substituted form been given or should be treated as given. Estoppel is out of the picture. In my opinion, therefore, the appeal fails on this ground, and this conclusion renders it unnecessary to consider the other grounds of defence relied upon by the licensee. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Markby, Stewart & Wadesons.*

Solicitors for respondents: *George Martin & Co.*

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MORRIS APPELLANT

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AND

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13, 14, 18,
20, 21, 22;
Mar. 22.

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By s. 143 of the Companies Act, 1929: "The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."

By art. 88 of Table A, in sch. I.: "All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

On February 1, 1940, C. and K. were the only directors and the only shareholders in a company, holding one share each. The articles of association incorporated art. 88 of Table A. C. and one S. falsely claimed that at a meeting held on that date S. was duly appointed a director and a minute was concocted to record the alleged appointment. On April 9, 1940, C. and S., in purported exercise of the power conferred by the articles of association, requested K. to resign his office and on April 12, 1940, they purported to hold a meeting of directors and to issue one share to S. and seven more shares to C. On April 26, 1940, an extraordinary general meeting of the company was held at which C., K. and S. were present; C. moved and S. purported to second a resolution to confirm the appointment of S. as a director. C. voted in favour of the resolution and K. against it and S. having purported to vote in favour of it, it was treated as carried, so that S. thereafter purported to act as a director. No general meeting was held in 1941 and accordingly, by the effect of art. 73 of Table A as varied by art. 22 of the company's articles of association, there were thereafter no de jure directors. In March, 1942, C. and S. purported to hold a meeting of directors and thereat to appoint one M. a director; all three then purported to allot thirty-four shares to M.; thirty-two more shares to S. and twenty-four more shares to C. Subsequently S. transferred seventeen of his shares to M.

Held that the invalid appointment of M. as a director and the invalid allotment of shares to him were not validated by s. 143 of the Act nor by art. 88 of Table A, since these were designed as machinery to avoid questions being raised as to the validity of transactions where there had been a slip in the appointment of a director and not to override substantive provisions relating to such

* *Present*: VISCOUNT SIMON, LORD THANKERTON, LORD PORTER, LORD SIMONDS and LORD UTHWATT.

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appointments. This was not a case where there was a defective appointment in the case of C. and S. but one where after 1941 there was no appointment of them as directors at all, so that their acts could not be validated. Further, the rule in *Royal British Bank v. Turquand* (1856) 6 E. & B. 327 did not apply to the allotment of shares to M., since in the transaction he was himself purporting to act as a director.

Decision of the Court of Appeal (sub nom. *Kanssen v. Rialto (West End), Ltd.*) [1944] Ch. 346, affirmed.

APPEAL from the Court of Appeal.

The facts, stated by Lord Simonds, were as follows: In two consolidated actions, in which this appeal was brought, the respondent Theodore Kanssen, a Dutchman, the plaintiff in both actions, in which the respondent company, Rialto (West End), Ltd. and the appellant Lewis Morris and two other persons, Robert Cromie and Eric Paul Strelitz, were defendants, sought to have it determined who were the directors and who were the shareholders and what shares they held of the respondent company. The company was incorporated on December 27, 1939, with the primary purpose of taking up a lease of the Rialto Cinematograph Theatre in Coventry Street, London. Its nominal capital was 100*l.* in 1*l.* shares. On its incorporation two shares were allotted to the subscribers to the memorandum of association, and they transferred them, the one to Cromie, the other to Kanssen. There was no question as to the validity of the issue and transfer of these two shares. At the same time the same subscribers to the memorandum, in exercise of the authority conferred on them by the articles of association of the company, appointed Cromie and Kanssen to be the first directors of the company. This was a regular and valid appointment. The company in due course embarked on the business for which it was incorporated. It entered into possession of the Rialto Theatre and acquired a lease of it. Soon disputes arose between Cromie and Kanssen, the merits of which were irrelevant to this appeal. Cromie made an alliance with Strelitz and together they concocted a scheme for getting rid of Kanssen. It was an essential part of this scheme that Strelitz should be appointed a director, so that Cromie and he could, under art. 8 (7) of the company's articles, call upon Kanssen to resign. They claimed, but falsely claimed, that at a meeting of directors held on February 1, 1940, at which Cromie and Kanssen were present, Strelitz was duly appointed a director,

and they concocted a minute to this effect, which was entered in the company's minute book and in due course signed by Cromie. Strelitz assumed to act as director, and on April 9, 1940, Cromie and he in purported exercise of their power under the articles requested Kanssen to resign his office of director. The request was a nullity and Kanssen remained a director. On April 12, 1940, Cromie and Strelitz purported to hold a meeting of directors, and thereat issued one share to Strelitz and seven more shares to Cromie. The issue was invalid and of no effect. On April 26, 1940, an extraordinary general meeting of the company was held. Cromie was there; so were Kanssen and Strelitz, but the latter had no right to be there. At that meeting Cromie moved and Strelitz seconded a resolution to confirm the appointment of Strelitz as a director. It was carried by the votes of Cromie and Strelitz against the opposition of Kanssen. There was no appointment to confirm. Strelitz had no right to second a resolution or to vote for it: Cromie could lawfully use one vote only. No resolution was effectively passed and no valid appointment emerged from these proceedings. Kanssen withdrew protesting, and continued to protest. Nevertheless from that time onward throughout 1940 and 1941 Strelitz acted as a director with Cromie. There was in fact little to be done, as the cinema was closed as the result of enemy action. No general meeting of the company was held in 1941. It was not disputed, therefore, that at the end of 1941 both Cromie and Strelitz (if he was a director) ceased to be directors under art. 73 of Table A as varied by art. 22 of the company's articles. From January 1, 1942, there were no directors of the company. Early in 1942 it appeared that the cinema might be able to reopen. Further finance was needed, and for that purpose Cromie got into touch with Morris and made an arrangement with him under which (inter alia) he was to become a director of the company and certain shares were to be allotted to him. In pursuance of this arrangement, on March 30, 1942, Cromie and Strelitz held a meeting of directors with the company's solicitor in attendance. The minute was as follows: "(1.) Mr Cromie, told the directors that he had "received certain proposals from Mr. Lewis Morris which would "enable the Rialto Cinema to be reopened and he, as a share- "holder, proposed to write a letter to Mr. Morris setting out "the terms of the arrangement. The letter was produced "and read. (2.) It was resolved that Mr. Lewis Morris be

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"appointed a director of the company and that he be made
 "managing director of the company. Mr. Lewis Morris
 "then joined the Board. (3.) An application from Mr. Cromie
 "for ninety shares of 1*l.* each in the capital of the company,
 "together with his cheque for 90*l.* was received. At his
 "request the application asked that the shares be allotted
 "thirty-four to Mr. Lewis Morris, thirty-two to Mr. Strelitz
 "and twenty-four to Mr. Cromie himself. It was resolved
 "that the shares be allotted as follows:

" Mr. Lewis Morris	..	34	shares	numbered	11	to	44
" Mr. E. P. Strelitz	..	32	"	"			45 to 76
" Mr. Robert Cromie	..	24	"	"			77 to 100

"It was resolved that share certificates be issued for all
 "the shares which had been allotted in the company." There
 were certain further proceedings which were irrelevant to
 this appeal. On or about April 20, 1942, Strelitz transferred
 seventeen of his shares to Morris. If all the shares had been
 validly issued, the position then would have been that
 Kansson held one share, Morris fifty-one shares, Cromie
 thirty-two shares and Strelitz sixteen shares. In the mean-
 time, on March 30, 1942, and on April 13, 1942, Kansson
 issued his writs in the two actions, which were afterwards
 consolidated. In effect he claimed (*inter alia*) that the only
 shares validly issued were the two shares issued to the sub-
 scribers and by them transferred to Cromie and to him and
 that the register of the company should be rectified by altering
 Cromie's holding to one share and removing the names of all
 other persons except himself therefrom. He also claimed
 a declaration that he and Cromie were the only directors of
 the company and that Strelitz and Morris were not directors.
 Cohen J. held that Strelitz and Morris were not directors
 and that, as no annual general meeting was held in 1941, all
 the directors went out of office on December 31, 1941 and that
 therefore there were no directors of the company. He also
 held that the only persons whose names should be on the
 register of shareholders were Kansson and Cromie in respect of
 one each, and Morris in respect of fifty-one shares; on the
 ground that he was entitled to rely on s. 143 of the Act and
 art. 88 of Table A as validating the issue of shares to him.
 He ordered the register of shareholders to be rectified
 accordingly. Kansson appealed and Morris cross-appealed.
 The Court of Appeal allowed the appeal, holding that Morris

could not rely on s. 143 or reg. 88, and dismissed the cross-appeal. Morris appealed to the House of Lords, the respondents being (a.) Kanssen, who did not appear and was not represented on the appeal, having been adjudicated bankrupt on July 28, 1944; (b.) the company; and (c.) Charles Walker, the trustee of the property of Kanssen.

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Christie K.C. and *Hillaby* for the appellant. The questions to be decided are (a.) whether the appellant is a director of the company and (b.) whether the shares were so allotted to him that he is entitled to remain on the register in respect of them. Though neither Cromie nor Strelitz has been a director since the end of 1941, the appellant at all material times believed them to be duly appointed directors and acted throughout with complete bona fides. Now Kanssen is debarred by his laches and acquiescence from alleging the invalidity of the issue of shares. For some two years before the commencement of this action the company's returns and its register showed Cromie and Strelitz as the only directors and as members holding between them nine out of ten of the issued shares. Kanssen took no steps to rectify the register or amend the returns. Accordingly he is estopped from disputing the validity of the acts of Cromie and Strelitz as directors so far as they affect the appellant. It would be inequitable to allow a retrospective rectification of the register by the removal of the name of Strelitz to prejudice the position of the appellant, who is an innocent third party. Moreover, at the time of the meeting of March 30, 1942, the defect in the appointment of Strelitz and the disqualification of Cromie had not been discovered and their acts were validated by the Companies Act, 1929, s. 143 and art. 88 of Table A in sch. I. The defect in this case is one which falls within the words defect in "qualification" in the section and "disqualified" in the article. Further, the section and the article are just as applicable to the appointment of an additional director as to any other act of a de facto board of directors. [They referred to *British Asbestos Co., Ltd. v. Boyd* (1); *Channel Collieries Trust, Ltd. v. Dover, St. Margaret's and Martin Mill Light Ry. Co.* (2); *Dawson v. African Consolidated Land & Trading Co.* (3) and *Tyne Mutual Steamship Insurance*

(1) [1903] 2 Ch. 439.

(3) [1898] 1 Ch. 6.

(2) [1914] 1 Ch. 568, 578;

[1914] 2 Ch. 506.

H. L. (E.) *Association v. Brown* (1).] The test to be applied is the good faith of the person relying on the section, the fact that he did not know the appointment in question to be invalid. Though a de facto director cannot continue to act after a "defect" in his appointment has become known to him, yet if thereafter, acting as a de facto director he takes part in appointing as a director a third party who is unaware of the irregularity, that third party can pray in aid the section and the article, provided he acted in good faith. Thus the fact that in this case the other acting directors knew of the defect in their appointment does not prevent the appellant from taking advantage of the section and the article. [They referred to *Murray v. Bush* (2); *Mahoney v. East Holyford Mining Co., Ltd.* (3); *Transport, Ltd. v. Schonberg* (4); *A. L. Underwood, Ltd. v. Bank of Liverpool and Martins* (5); *B. Liggett (Liverpool), Ltd. v. Barclays Bank, Ltd.* (6).] The appellant is entitled to rely on the section and the article because at all material times he had not discovered the defect in question. The knowledge of Cromie cannot be imputed to him, for Cromie was not acting as his agent and in any event Cromie was practising a fraud on him. [They referred to Halsbury's Laws of England, 2nd ed., vol. I., p. 291, para. 477: *Société Générale de Paris v. Tramways Union Co., Ltd.* (7); *Saffron Walden Second Benefit Building Society v. Rayner* (8); and *Wells v. Smith* (9).] Cromie was not the appellant's agent because the actual contract under which the appellant became a shareholder was made between him and the company. Further, under the general law the appellant was entitled to treat the shares as validly issued. In any event, he was entitled, as a person dealing with a company in good faith, to assume that acts within its constitution and powers had been duly performed and he was not bound to inquire whether acts of internal management had been regular: *Royal British Bank v. Turquand* (10). Acting in good faith, he was entitled to treat the shares as validly allotted, since three directors of the company could allot them and three persons purporting to act as directors did so. An outsider is one who is neither an officer nor a member of the company and before

(1) (1896) 74 L. T. 283.

(2) (1872) L. R. 6 H. L. 37.

(3) (1875) L. R. 7 H. L. 869.

(4) (1905) 21 T. L. R. 305.

(5) [1924] 1 K. B. 775.

(6) [1928] 1 K. B. 48.

(7) (1884) 14 Q. B. D. 424.

(8) (1880) 14 Ch. D. 426.

(9) [1914] 3 K. B. 722.

(10) (1856) 6 E. & B. 327.

the meeting of March 30, 1942, the appellant was neither. Even after his purported appointment as a director, which took place immediately before the unauthorized allotment of shares he had in fact no opportunity of becoming acquainted with the true state of affairs. Had the allotment of shares been made first there could have been no doubt but that the appellant could have invoked *Royal British Bank v. Turquand* (1). It would be absurd if a difference in the order of proceedings should have this effect. The appellant was not in a position to know any more about the affairs of this company than were the bankers to know about the affairs of the company in *Mahoney v. East Holyford Mining Co., Ltd.* (2). He made all reasonable inquiries.

Richmount for the respondent company. This respondent places itself in the hands of the House while submitting that its costs should be provided for.

Jennings K.C. and *M. Albery* for the respondent Walker. The appellant had notice of Kanssen's claims before the meeting of March 30, 1942, and yet made no proper inquiry as to their validity or otherwise but took the risk of their being well founded and, accordingly, he is not entitled to rely on s. 143 of the Companies Act, 1929, or art. 88 of Table A. [They referred to *Ex parte Snowball* (3); *Mahoney v. East Holyford Mining Co., Ltd.* (2); *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.* (4); *A. L. Underwood, Ltd. v. Bank of Liverpool and Martins* (5) and the Companies Act, 1929, s. 372.] Discovery means discovery by the directors. In this case, since Cromie and Strelitz knew all along of the defect, it was not "afterwards discovered" within art. 88. In any event, there was no "defect" in the appointment of Strelitz as a director within the meaning of s. 143 and art. 88, since he was never appointed at all: see *Tyne Mutual Steamship Insurance Association v. Brown* (6) which has been impliedly approved by the legislature by its re-enactment of the same provision in successive Companies Acts. Further, after the end of 1941 neither Cromie nor Strelitz were directors, their period of service being over, so that there was no question of any "defect" since there was a complete vacancy: see *In re Consolidated Nickel Mines, Ltd.* (7). If this can be called a "defect," by an

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(1) 6 E. & B. 327.

(5) [1924] 1 K. B. 775.

(2) L. R. 7 H. L. 869.

(6) 74 L. T. 283.

(3) (1872) L. R. 7 Ch. 534, 548.

(7) [1914] 1 Ch. 863, 888.

(4) [1895] 1 Ch. 629, 636.

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unusual use of the word, it is a defect of a radical sort with which the section and the article are not concerned. The only two kinds of defect which the section and the article can remedy are defects (a.) in appointment and (b.) in qualification. Such defects are not present in this case. If a man ceases to be a director by expiry of his term of office that is a defect neither in appointment nor in qualification. *Mahoney v. East Holyford Mining Co., Ltd.* (1) on a proper reading of the facts was a case of defective appointment rather than of no appointment. [They referred to *Dawson v. African Consolidated Land and Trading Co.* (2); *British Asbestos Co., Ltd. v. Boyd* (3); *Channel Collieries Trust, Ltd. v. Dover, St. Margaret's and Martin Mill Light Ry. Co.* (4) and *Murray v. Bush* (5).] Moreover, Cromie was the agent of the appellant and Cromie's knowledge must be imputed to him so as to disentitle him to rely on the section and the article. Alternatively the appellant was a mere nominee of Cromie in respect of the shares allotted to him so that he had no privity of contract with the company and the section and the article did not operate to validate his title. The arrangement was between Cromie and the appellant and Cromie was acting as a shareholder in his private capacity and not as a director. Though he was undertaking to procure the company to do various things, that did not make him its agent and the mere fact that it knew of the arrangement between him and the appellant did not prevent the appellant being a mere nominee as between himself and the company. There is nothing in the section or the article to permit a person with a derivative title to take advantage of them. Further, the appellant cannot rely on the principle in *Royal British Bank v. Turquand* (6). For the purposes of the application of that principle he is not an outsider. An outsider only sees what an outsider can see, whereas a director can see all the business documents of the company; a person who can do that is not an outsider but an insider and it does not matter whether he is a de jure or a de facto director. All the authorities proceed on the footing that an outsider is seeking the benefit of the rule; none of them approaches the point on the footing that it is revelant whether an insider has had a reasonable opportunity of finding out the facts. [They referred to *Mahoney v. East Holyford Mining Co., Ltd.* (7);

(1) L. R. 7 H. L. 869, 872, 882.

(5) L. R. 6 H. L. 37.

(2) [1898] 1 Ch. 6, 15.

(6) 6 E. & B. 327.

(3) [1903] 2 Ch. 439, 444, 445.

(7) L. R. 7 H. L. 869, 894.

(4) [1914] 2 Ch. 506, 511.

County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co. (1) and Buckley on the Companies Acts, 11th ed., p. 305.] H. L. (E.)

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Christie K.C. in reply. The appellant at the material time had not discovered the invalidity of the appointments. *In re Canadian Land Reclaiming and Colonizing Co.* (2); *Craven-Ellis v. Canons, Ltd.* (3). This case comes within the section and the article. There is here, if not a defect in appointment, at any rate a disqualification: see *British Asbestos Co., Ltd. v. Boyd* (4). As regards the allotment of the shares, the appellant was to be the beneficial owner.

THE HOUSE took time for consideration.

Mar. 22. VISCOUNT SIMON. My Lords, the opinion which Lord Simonds has prepared in this appeal and which he is about to deliver covers the whole ground, and I need say no more than that I concur in every respect with his conclusions. As regards costs, the question which I should propose to put to the House when the appeal is dismissed is: That the appellant do pay the respondent Walker his costs in this House and that the respondents Rialto (West End), Ltd. do bear and pay their own costs in this House. I move that the appeal be dismissed.

LORD THANKERTON. My Lords, I also have had the opportunity of considering the opinion about to be delivered by my noble and learned friend, Lord Simonds, and I concur in it.

LORD PORTER. My Lords, I have had the like opportunity and likewise concur.

LORD SIMONDS, having stated the facts, continued: I will dispose at once and in a few words of the question of directorship. Though it appears not to have been realized until then, it was in the course of the trial appreciated what was the effect of art. 73 of Table A as varied by the company's art. 22, and it was admitted then and at the bar of the House that neither Cromie nor Strelitz has in any view been a director since the end of 1941. The same consideration applies to

(1) [1895] 1 Ch. 629, 633. (3) [1936] 2 K. B. 403.

(2) (1880) 14 Ch. D. 660. (4) (1898) 1 Ch. 6, 13.

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Kanssen. Whether or not he ceased to be a director at an earlier date, at any rate he did so at the end of 1941. Morris rests his claim upon his appointment by Cromie and Strelitz at the meeting of March 30, 1942. But, apart from the considerations which apply equally to the allotment of shares and to this appointment, it is, I think, clear that neither the section of the Companies Act and the article, which I shall have to consider, nor the general law can avail to establish him in his office of director when he was not in fact appointed a director. To Cohen J. and to the Court of Appeal this seemed too plain for argument.

I turn then to the more difficult question of the shares. It is clear that no shares were in fact validly issued except the one share each held by Cromie and Kanssen, and Cohen J. accordingly, having decided the long and hotly contested question of fact in favour of Kanssen, ordered the register to be rectified by striking out the name of Cromie as the holder of any but one share and the name of Strelitz altogether. It remained to consider the case of Morris. Morris, faced with the fact that the shares were not validly issued, relied on defences arguable by him but not open to Cromie or Strelitz. He claimed the benefit of s. 143 of the Companies Act, 1929, and of art. 88 of Table A. I do not pause here to set them out. I will do so later. He further claimed under the general law that, even if the shares were not validly issued, yet he was entitled to treat them as validly issued, a claim that must have been faintly pursued in the courts below, since it finds no mention in any judgment. He further claimed that Kanssen was debarred by his laches from alleging the invalidity of the issue of shares. This last claim has no justification. I observe that neither Cohen J. nor the Court of Appeal deal with it, presumably because to them as to me it appeared upon the facts to be incapable of serious argument.

At the hearing before Cohen J. and in the Court of Appeal the major argument turned upon the section and article to which I have referred, the defence on which Morris relied being met by the plea that in the circumstances of the case neither section nor article was relevant and, even if they were, they would not avail him since he was put upon his inquiry and might, if he had made proper inquiries, have discovered the truth. Several questions of difficulty seem to be here involved ; first, whether either section or article has any application to the present case ; second, what amounts to discovery of a defect for the

purpose of either section or article and whether any party is debarred from its benefit unless and until he has himself discovered the defect; third (an elaboration perhaps of the second question) whether, if a party is put upon his inquiry and he might if he made inquiry discover the defect, he can still say that he has not discovered it, and fourthly, in the circumstances of the present case whether Morris was in fact put upon his inquiry and, being so put, made the proper inquiry. It seems that in both courts below it was on the first question assumed (not indeed by counsel for Kanssen but in the judgments of the court) that the section and article were relevant. In both courts too, on the second question it was decided that Morris could rely on them unless he discovered the defect: it was immaterial that Cromie and Strelitz were at all times well aware of it. On the third question both courts decided that Morris was put on his inquiry, holding that, if he relied on the section or article he must be subject to the same obligation as if he was relying on the general law as stated in *Royal British Bank v. Turquand* (1) to which I refer later. It was upon the fourth question that the courts diverged, Cohen J. holding that, being put upon his inquiry, he made the inquiries that the circumstances demanded, the Court of Appeal holding that he had not made such inquiries and therefore could not be allowed to say that he had not discovered this defect. I have ventured to state in this compendious form judgments which covered a wide field. I have done so because the conclusion to which I understand that your Lordships have unanimously come on the first question, makes it unnecessary to consider the other questions. They arise only if the circumstances of the present case bring it within the scope of section or article.

Before I consider this first question I may dispose of two other matters. First, I agree with the Court of Appeal that in any view of the case Morris cannot maintain that the seventeen shares allotted to Strelitz and by him transferred to Morris were validly allotted. Strelitz at all times knew of the defect and Morris could get no better title. Secondly I observe that Lord Greene M.R. (2) dismissed Morris's plea on the additional ground that either Cromie was a principal as between himself and the company (in which case Morris was merely a nominee between whom and the company there was no privity) or that he was acting as agent for Morris in applying

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(2) [1944] Ch. 346, 360.

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for the shares allotted to him. I do not think that the first alternative is on the facts a tenable view. But the Master of the Rolls goes on to say that if the latter view is right the knowledge of the defect which the agent had must be imputed to the principal, Morris thus being affected with Cromie's knowledge. My Lords, I would not be taken as assenting to this view which appears to ignore both the capacity in which Cromie acquired the relevant knowledge and the fact that Cromie was acting fraudulently as well towards Morris as to other parties.

The first question to which I return is whether (1.) s. 143 of the Companies Act, 1929, or (2.) art. 88 of Table A which was adopted by the company has any relevance to the circumstances of the present case. Section 143 of the Companies Act, 1929, which is in the same terms as corresponding sections in previous Acts, provides that: "The acts of a director or " manager shall be valid notwithstanding any defect that may " afterwards be discovered in his appointment or qualification." Article 88 of Table A, which does not materially differ from similar articles in earlier Tables, provides that " All acts done " by any meeting of the directors or of a committee of directors, " or by any person acting as a director, shall, notwithstanding " that it be afterwards discovered that there was some defect " in the appointment of any such director or person acting as " aforesaid, or that they or any of them were disqualified, be " as valid as if every such person had been duly appointed " and was qualified to be a director." The section can be invoked only where there is a defect afterwards discovered in the appointment or qualification of a director; in the article the condition is that it is afterwards discovered that there was some defect in the appointment of a director or person acting as a director or that he was disqualified to act as a director. Though the language of the section differs in some respects from that of the article, it does not appear that the difference is material for the purpose of the present case.

The facts relevant to the question now under consideration have already been stated. I will very briefly tabulate them: (1.) On February 1, 1940, Cromie and Kanssen were the only directors and the only shareholders holding one share each. (2.) On or about that date the fraudulent assumption of office by Strelitz and a minute concocted to record an appointment which did not take place. (3.) On April 9, 1940, an ineffective attempt to expel Kanssen from his office. (4.) On April 12,

1940, the ineffective allotment of one share to Strelitz and seven shares to Cromie at a purported meeting of directors. (5.) On April 26, 1940, an extraordinary general meeting of the company at which as I have pointed out nothing was effectively done. (6.) At the end of 1941 the determination of the term of office of Cromie and Kanssen and of Strelitz, if he was a director, and from that date no directors of the company.

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It is in these circumstances that the question arises whether the section or article can be called in aid by Morris in order to validate the transactions of March 30, 1942, namely, the allotment to him of shares or the appointment of him as a director. Do the facts that I have stated establish a defect in the appointment or qualification of Cromie or Strelitz? There is, as it appears to me, a vital distinction between (a.) an appointment in which there is a defect or, in other words, a defective appointment, and (b.) no appointment at all. In the first case it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose; in the second case there is not a defect, there is no act at all. The section does not say that the acts of a person acting as director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director. Even if it did, it might well be contended that at least a purported appointment was postulated. But it does not do so, and it would, I think, be doing violence to plain language to construe the section as covering a case in which there has been no genuine attempt to appoint at all. These observations apply equally where the term of office of a director has expired, but he nevertheless continues to act as a director, and where the office has been from the outset usurped without the colour of authority. Cromie's acts after the end of 1941 were not validated by the section: Strelitz's acts were at no time validated. I have so far dealt with defect in "appointment" and what I have said in regard to the section covers the article also where the same words are repeated. Some argument was founded by counsel for the appellant upon the words in the section "or qualification" and in the article "disqualified." This argument is not easy to follow. So far as both Cromie and Strelitz were concerned, there was no defect in their qualification after the end of 1941. They were not disqualified. They were, so far as I know, qualified to act, but they had not been appointed.

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I do not suggest that qualification refers only to the holding of qualification shares. But whatever extended meaning may be given to "qualification" or "disqualified" I find it impossible to say that it covers the case of Cromie or of Strelitz. The point may be summed up by saying that the section and the article, being designed as machinery to avoid questions being raised as to the validity of transactions where there has been a slip in the appointment of a director, cannot be utilized for the purpose of ignoring or overriding the substantive provisions relating to such appointment.

I have come to this conclusion unaided by authority, but I am glad to find that it is supported by clear and cogent authority. In *Tyne Mutual Steamship Insurance Association v. Brown* (1), the meaning of the corresponding section of the Companies Act then in force and of a strictly comparable article had to be considered, where the facts were that directors had continued to act after their term of office had expired, and Lord Russell of Killowen C.J., having read the article, thus expressed himself (2): "What does this provide? It provides for the "cure of defects in the appointment or qualification of directors. "Here there has been no appointment at all." He held, therefore, that the article had no application to the case. This authority has stood unchallenged for fifty years, and, though on two occasions since its decision the whole law relating to limited companies has been reviewed by expert committees and amended by the legislature, it has in this respect remained unaltered. This affords strong support for a construction which in any case appears to me to be the correct one. I would add that, though no other express authority has been called to the attention of the House, yet the language of Lord Lindley M.R. and Chitty L.J. in *Dawson v. African Consolidated Land and Trading Co.* (3), of Farwell J. in *British Asbestos Co. Ltd. v. Boyd* (4) and of Lord Cozens-Hardy M.R. and Swinfen Eady L.J. in *Channel Collieries Trust, Ltd. v. Dover, St. Margaret's and Martin Mill Light Ry. Co.* (5), clearly indicates that in the opinion of those learned judges the section and article alike deal with slips or irregularities in appointment not with a total absence of appointment, and still less with a fraudulent usurpation of authority. Coming to this conclusion, I do not find it neces-

(1) 74 L. T. 283.

(2) Ibid. 285.

(3) [1898] 1 Ch. 6.

(4) [1903] 2 Ch. 439.

(5) [1914] 2 Ch. 506.

sary to express any opinion on the question what is the meaning of the words " afterwards discovered " in the section. I would not be taken as either assenting to or dissenting from the proposition, which appears to have been accepted in the courts below, that the section or article can be called in aid by a third party unless and until he has himself discovered the defect in the appointment or qualification of a director. Nor would I express any final view on what for this purpose amounts to " discovery," and in particular whether the rule as to inquiry is to be imported into the consideration of it.

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The appellant having failed, for the reason that I have indicated, to establish his case upon the section or the article, was allowed by the indulgence of the House, although he had not raised the point in his formal case, to contend that he was in any case entitled to succeed by virtue of the rule of law which is conveniently called the rule in *Turquand's* case (*Royal British Bank v. Turquand*) (1). On this contention the House has not the benefit of the opinion either of Cohen J. or the Court of Appeal, before whom the point, if taken at all, appears not to have been pressed. The claim under this head refers only to the allotment of the thirty-four shares which were allotted to Morris on March 30, 1942. On this contention two questions appear to arise: (1.) whether Morris can in the circumstances invoke the rule and (2.) whether, if he can otherwise do so, he is nevertheless debarred from relief under it upon the ground that he was put upon his inquiry and might, if he had made proper inquiries, have learned the truth. The first question involves, first, a consideration of Morris's position when the shares were allotted to him, and secondly an examination of the rule in order that it may be determined whether Morris comes within its scope. Though little credence could be attached to the uncorroborated testimony of Cromie or Strelitz, Morris was accepted by Cohen J. as a witness of truth, and his evidence agreed with that of the recorded minute of March 30, 1942, which itself is made *prima facie* evidence by s. 120, sub-s. 2, of the Companies Act, 1929. It appears then that the board meeting held on that day fell into two parts. There were first present as directors Cromie and Strelitz, with the company's solicitor in attendance. Cromie " told the directors " (so runs the minute) " that he " had received certain proposals from Mr. Lewis Morris which " would enable the Rialto cinema to be reopened and he, as

(1) 6 E. & B. 327.

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" a shareholder, proposed to write a letter to Mr. Morris " setting out the terms of the arrangement. The letter was " produced and read." Upon this it was resolved that Morris be appointed a director of the company and that he be made managing director of the company. Morris, it is recorded, then joined the board. What I must regard as the second part of the meeting with the new board then began, and the minute records that an application from Cromie for ninety shares of $\text{1}l.$ each in the capital of the company together with his cheque for $90l.$ was received and that at his request the application asked that the shares be allotted thirty-four to Morris, thirty-two to Strelitz and twenty-four to Cromie, and that it was resolved that the shares be so allotted (the numbers of the shares being given) and that it was further resolved that share certificates be issued for all the shares which had been allotted in the company. There were certain further proceedings to which I need not refer. From this narrative it is clear that Morris himself acted as a director in the allotment and issue of the shares, including those allotted and issued to himself. It is, I think, an irrelevant consideration that he had only become a director immediately before that event. On this I will say something later. He in fact acted as a director and was the officer and agent of the company in the allotment and issue of shares. "That neither his acts nor those of his colleagues were valid is for the purpose of this argument assumed. The question is whether he can nevertheless under the rule in *Turquand's* case (1) claim that he is entitled as between himself and the company to treat that act as done with the authority of the company, which was in fact and in law done without its authority.

My Lords, I think that this question admits of an easy answer. The so-called rule in *Turquand's* case (1) is, I think, correctly stated in Halsbury's Laws of England, 2nd ed., vol. V., at p. 423: " But persons contracting with a company " and dealing in good faith may assume that acts within its " constitution and powers have been properly and duly " performed and are not bound to inquire whether acts of " internal management have been regular." It was competent for three directors of the company to allot its shares; three persons purporting to act as directors did allot its shares; therefore Morris, who acted in good faith, was entitled to treat the shares as validly allotted. Thus runs the argument.

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I leave aside the question what in the application of the rule is the meaning of "good faith" and whether Morris, according to the true meaning of those words, acted in good faith, and ask whether Morris can in any event bring himself within the scope of the rule. My Lords, I think it is clear on principle that he cannot. In the transaction which he would sustain and Kansson seeks to impeach, he was himself acting as a director. I asked learned counsel for the appellants whether there was any authority for the proposition that a director or de facto director could invoke the rule so as to validate a transaction which was in fact irregular and unauthorized. He could point to none. My own researches, though in such a matter they cannot easily be complete, have disclosed no case in which such a proposition has been affirmed. Nor have I met any case in which such a person has without discussion of the principle obtained such relief. Nor had I even heard the proposition put forward until I heard it at the bar of the House in this case. The reason is not far to seek. One of the fundamental maxims of the law is the maxim "*omnia praesumuntur rite esse acta*." It has many applications. In the law of agency it is illustrated by the doctrine of ostensible authority. In the law relating to corporations its application is very similar. The wheels of business will not go smoothly round unless it may be assumed that that is in order which appears to be in order. But the maxim has its proper limits. An ostensible agent cannot bind his principal to that which the principal cannot lawfully do. The directors or acting directors or other officers of a company cannot bind it to a transaction which is ultra vires. Nor is this the only limit to its application. It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done. What then is the position of the director or acting director who claims to hold the company to a transaction which the company has not, though it might have, authorized? Your Lordships have not in this case to consider what the result might be if such a director had not himself purported to act

H. L. (E.) on behalf of the company in the unauthorized transaction. For here Morris was himself purporting to act on behalf of the company in a transaction in which he had no authority. Can he then say that he was entitled to assume that all was in order? My Lords, the old question comes into my mind, "Quis custodiet ipsos custodes?" It is the duty of directors, and equally of those who purport to act as directors, to look after the affairs of the company, to see that it acts within its powers and that its transactions are regular and orderly. To admit in their favour a presumption that that is rightly done which they have themselves wrongly done is to encourage ignorance and condone dereliction from duty. It may be that in some cases, it may be that in this very case, a director is not blameworthy in his unauthorized act. It may be that in such a case some other remedy is open to him, either against the company or against those by whose fraud he was led into this situation, but I cannot admit that there is open to him the remedy of invoking this rule and giving validity to an otherwise invalid transaction. His duty as a director is to know; his interest, when he invokes the rule, is to disclaim knowledge. Such a conflict can be resolved in only one way.

It was urged upon your Lordships that the purported appointment of Morris as a director having taken place immediately before the unauthorized allotment of shares, he had in fact no opportunity of learning the true state of affairs, and it was pointed out that, had the proceedings at the meeting of March 30, 1942, been taken in the reverse order first the allotment of shares, then the appointment of Morris as a director, the result would be different. And then it was said that it was so absurd that there should be a different result according to the order of proceedings that the original conclusion could not be accepted. This argument has for me no weight or substance. Admit, as to my mind one must admit, that a director is not for the purpose of the rule in the same position as a stranger: then it is as immaterial how long he has been a director, as it is whether he is an idle or diligent director or a robust or sick director.

Concluding as I do that Morris is not a person who in respect of this transaction comes within the scope of the rule, I do not find it necessary to consider the further question whether in any case he would be deprived of its benefit by reason of the fact that even regarded as an outsider he was put upon his inquiry and did not make the

inquiry that he should have made. This is a question of fact on which different views have been, and may well be, entertained. In my opinion the appeal should be dismissed.

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LORD UTHWATT. My Lords, I agree.

Appeal dismissed.

Solicitors for appellant : *Billinghurst, Wood & Pope.*

Solicitors for the respondent company : *Paisner & Co.*

Solicitors for the respondent Walker : *Ashurst, Morris, Crisp & Co.*

Infant [HOUSE OF LORDS.]

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AND

Jan. 25, 28,
29;
Mar. 29.

OSTIME (INSPECTOR OF TAXES). RESPONDENT.

Revenue—Income tax—Water undertaking—Part of income provided out of general rate—Trading receipt—Pontypridd and Rhondda Water Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. CXX), s. 91—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), sch. D., Case I.

Payments in the nature of a subsidy from public funds made to an undertaker to assist in carrying on the undertaker's trade or business are trading receipts to be brought into account in arriving at the balance of profits or gains under Case I of sch. D. of the Income Tax Act, 1918, save in the case where the undertaker is a rating authority and the subsidy is the proceeds of rates imposed by it or comes from a fund belonging to it.

Acting under statutory authority, a water undertaking issued precepts calling for lump sums duly apportioned to be contributed by its two constituent local authorities to meet an estimated deficiency in its anticipated revenue during the succeeding twelve months derived from payments in respect of water supplied. The local authorities paid the sums, levying them on their rate-payers, though they had also power to pay them out of their district funds. Had either of them failed to do so the undertaking had power to levy a rate in the district of the defaulting council, but it had otherwise no power to levy a rate. The undertaking

* *Present* : VISCOUNT SIMON, LORD THANKERTON, LORD WRIGHT, LORD PORTER and LORD SIMONDS.

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was not directly representative of the inhabitants of the districts of the local authorities and its limits of supply did not include the whole of both these districts.

Held, that there was no such identity between the local authorities which contributed the precepts and the undertaking which received them as to remove them from the class of trading receipts to be included in the computation of trade profits for the purpose of assessment under Case I. of sch. D. to the Income Tax Act, 1918.

Glasgow Corporation Water Commissioners v. Inland Revenue Solicitor (1875) 2 R. 708; 1 Tax Cas. 28, explained and distinguished.

Decision of the Court of Appeal (sub nom. *Ostime v. Pontypridd and Rhondda Joint Water Board*) (1944) 171 L. T. 211, affirmed.

APPEAL from the Court of Appeal.

The facts, stated by LORD THANKERTON, were as follows :—The appellant board was established as a corporate body by a local Act, the Pontypridd and Rhondda Water Act, 1910, the board being constituted as follows : (A.) The chairman for the time being of the Rhondda Urban District Council ; (B.) The chairman for the time being of the Pontypridd Urban District Council ; (C.) Six members to be appointed by the Rhondda Urban District Council ; (D.) Four members to be appointed by the Pontypridd Urban District Council ; and it was provided that no one was qualified to be a member of the board unless he was a member of either of these two urban district councils, these two councils being referred to in the Act as “ the constituent authorities.” Under ss. 58 and 59 of the Act of 1910, as amended by s. 25, sub-s. 6 of the Pontypridd and Rhondda Water Act, 1913, the limits of supply within which the appellant board were authorized to supply water direct to consumers were (1.) the Pontypridd Urban District, and (2.) part only of the Rhondda Urban District, but in addition the appellant board were authorized to sell water in bulk to the water undertakers in (1.) the Llantrisant and Llantwit Fardre Rural District, and (2.) part of the Caerphilly Urban District. The maximum charges which might be made by the appellant board for supplies taken by consumers within the limits of supply were fixed by ss. 61, 67 and 68 of the Act of 1910, ss. 26 and 27 of the Act of 1913, and s. 18 of the Pontypridd and Rhondda Water Act, 1925. The maximum permitted charges were at all material times charged by the appellant board. The payments received by the appellant board from the persons to whom water was supplied consisted of (a) payments made direct to the appellant board by the consumers within the limits

of supply, and (b) payments made by the water undertakers in the Llantrisant and Llantwit Fardre Rural District and part of the Caerphilly Urban District for water sold to them in bulk. It was admitted that both these classes of payments were trade receipts. In addition further sums were received by the appellant board by virtue of s. 91 of the Act of 1910, the material portion of which provided as follows :—“(1.) Before the first day of April in each year or so soon thereafter as may be practicable the board shall make or cause to be made an estimate of the probable revenue and expenditure other than capital expenditure which will be received and incurred respectively during the year beginning on that day and if such estimate shows that there will be a deficiency in the net revenue of the board for the year the board are hereby authorized and required in every case forthwith to apportion the sum required to meet such deficiency between the constituent authorities in accordance with the provisions of this section. (2.) The sum required to meet any deficiency whether for satisfying past or future liabilities shall be apportioned between and borne by the constituent authorities in the proportion which the assessable value of the Pontypridd District bears to the assessable value of that part of the Rhondda District which is within the limits of supply. (3.) The board shall issue precepts to the constituent authorities for the amounts apportioned in pursuance of this section and the constituent authorities respectively shall within three months from the receipt of such precepts pay to the board the amount so apportioned to them respectively. (4.) Such amounts respectively shall be paid by the constituent authorities out of their respective district funds and general district rates which funds and rates are hereby charged with the payment of the same accordingly and the constituent authorities respectively are hereby authorized and required to make and levy any rate that may be necessary for the purposes of this section. (5.) If either constituent authority fails to pay any amount so apportioned the board may proceed for recovery thereof in either of the modes following (a) The board may sue the defaulting authority for the amount unpaid (b) The board may by precept empower some officer of the board to raise by means of a rate to be assessed upon the like property and to be levied and collected in the like manner and with the like powers and authorities as the general

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“ district rate of the defaulting authority such sum to be specified
“ in the precept as in the opinion of the board will be sufficient
“ to pay the amount in arrear . . . ”

Pursuant to s. 91, the appellant board made an estimate, which showed an estimated deficiency of 9,930*l.* in the net revenue of the appellant board for the period ending March 31, 1939, and issued precepts on the constituent authorities for the respective sums apportioned to them out of the said amount. These sums were duly paid by the constituent authorities, being levied on all their ratepayers, and an appropriation account of the appellant board for that year showed the amount of 9,930*l.* as received under these precepts. At a meeting of the Commissioners for the General Purposes of the Income Tax for the Division of Miskin in the county of Glamorgan on October 28, 1941, the appellant board appealed against an assessment to income tax made upon it under Case I. of sch. D. of the Income Tax Act, 1918, in the estimated sum of 10,000*l.* for the year 1939-40, in respect of the profits of its trade, namely the supply of water. It was contended for the appellant board (*a*) that the moneys received under the precepts were not trading receipts, and (*b*) that the amounts paid by them to the Taf Fechan Water Supply Board, for purchases in bulk of some of the water from which they supplied their own customers were payments wholly and exclusively laid out or expended for the purposes of their trade and were deductible on that ground. The Commissioners decided that in ascertaining the appellant board's taxable income (*a*) sums received under precept were not trading receipts and should not be included and (*b*) amounts paid to the Taf Fechan Water Supply Board should be deducted. The respondent having demanded a case stated, Macnaghten J. dismissed his appeal. The Court of Appeal allowed an appeal by the respondent, holding that the sums received under precept were trading receipts. The court, however, held that the amounts paid to the Taf Fechan Water Supply Board should be deducted and this decision was not now challenged. On the other point the appellant board appealed to the House of Lords.

Tucker K.C. and *Donovan K.C.* for the appellants. It is of particular importance to note that the appellant board represents the two urban district councils and also that, although they admittedly carry on the trade of supplying water to various individuals or bodies who may or may not be ratepayers in the

districts of those councils, they cannot make profits, since, after meeting the expenses laid down by the Act of 1910, the balance remaining over must be handed to the constituent authorities who are liable to make up any deficiency (see s. 92). Where a local authority carries on a commercial undertaking at a loss and is permitted to make good that loss by a compulsory rate levied on the ratepayers, the amount of the rate so raised is not a receipt of its trade. The appellant board's position in respect of the sum raised by precept to meet its trading losses is similar to that of a local authority, its "ratepayers" being either the two councils, the Rhondda Urban District Council and the Pontypridd Urban District Council, as its constituent authorities, or the individual ratepayers of those two districts. A ratepaying body may consist of two just as well as of two million. The appellants' position is analogous to that of a county council which derives its revenue by precept from the borough councils and other local authorities, in that the proceeds of local rates are not income for the purposes of income tax law. The position of this undertaking is no different from a case in which a local authority might provide a tramway service charging fares but incurring a loss and calling on the ratepayers to make up the deficiency. The receipt of that deficiency would not be a trading receipt. That sum, like the amount of the precept in the present case, is not received for the purpose of making profits but for the purpose of preventing or making good a loss or deficiency. The real position in this case is that the two urban district councils are taxing themselves to give money to the appellant board, as their representatives, for their own purposes to provide for a deficiency in carrying on what is really their own undertaking. These councils are submitting to an assessment on themselves to assure themselves a supply of water. Thus, the amount of these precepts falls within the class of sums received by an undertaking out of local rates which are not taxable because the undertaker himself imposes the rates. A local authority raising a rate is not receiving income, as this is a levying by the community of a tax on itself. The position is that the individual members of the appellant board represent the two urban district councils, which represent these ratepayers. This case is similar to *Glasgow Corporation Water Commissioners v. Inland Revenue Solicitor* (1) which was rightly decided and applies to it. See also *Mersey Docks and Harbour Board v. Lucas* (2); *Glasgow*

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(1) (1875) 2 R. 708; 1 Tax Cas. 28. (2) (1883) 8 App. Cas. 891.

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Corporation Water Commissioners v. Miller (1), and *Forth Conservancy Board v. Inland Revenue Commissioners* (2), and the definition of "rates" in s. 68 of the Rating and Valuation Act, 1925. On general grounds these sums are not trade receipts: *Seaham Harbour Dock Co. v. Crook* (3); *Lincolnshire Sugar Co., Ltd. v. Smart* (4). Everything that the appellants receive on revenue account in any way connected with the water undertaking is not necessarily a trading receipt. A sum of this nature will not be part of the trading receipts nor an annual profit or gain unless it is received as the price of water supplied either under an agreement or by virtue of a statutory duty, owed to the person taking the supply, to supply it, which amounts to a statutory contract. The sums here in question were not received in consideration of water supplied or to be supplied. They were payable by the constituent authorities even though no water was supplied at all, e.g., if during the war the waterworks had been put out of action. The ratepayers in the districts of the two constituent authorities were liable to find the money to produce the amount of the precepts, whether they had taken water or not; those living in the part of the Rhondda district outside the appellants' limits of supply could not take it. A contribution by someone who is not a customer cannot be taken into account as a trading receipt. Moreover, the appellants had already received the maximum charges permitted by the law for the water they had supplied. It would lead to inconsistencies if the amount of this precept were held to be subject to income tax. Assume that on a commercial account the receipts of the appellants exactly balanced their expenditure, but that part of the expenses deducted were not allowable as deductions for income tax purposes, so that for those purposes there was a profit on which income tax had to be paid. The appellants would then have to issue a precept for the amount of the tax payable and would receive that amount from its constituent authorities. The amount so received could not be held to be a receipt from the carrying on of their trade and itself liable to be taxed as such.

Sir Patrick Hastings K.C. and *R. Hills* for the respondent. The sums paid to the appellants in response to the precepts issued by them to the urban district councils should be included

(1) (1886) 13 R. 489; 2 Tax
Cas. 131.

(2) [1931] A. C. 540, 546.

(3) (1931) 16 Tax Cas. 333.

(4) [1937] A. C. 697.

in the computation of the profits of their trade for the purpose of assessment to income tax. The appellants are carrying on a trade and are liable to pay income tax if they make a profit. Their trade is selling water and if they do not sell at a price which enables them to continue without having to find more money they receive an allowance or subsidy from the urban district councils to enable them to make up the position : see s. 91, sub-ss. 3 and 4 of the Act of 1910. The so-called "precept," designed to cover trading expenses, is only a payment made to ensure that the trading is not carried on at a loss and to enable the appellants to balance their budget and accordingly it is taxable : see *Pretoria-Pietersburg Ry. Co., Ltd. v. Elwood* (1). The fact that it comes out of the rates is irrelevant. Municipal officers are paid out of the rates but that does not exempt their salaries from income tax. The Rating and Valuation Act, 1925, has nothing to do with this case. On the facts *Glasgow Corporation Water Commissioners v. Inland Revenue Solicitor* (2) does not apply, since this is not a case of an undertaker identical with the rating authority receiving a subsidy which is the proceeds of rates imposed by it. From the Act of 1910 it appears (a) that a trade is being carried on, and (b) how the appellant board is constituted. A payment such as this need not be received as the price of water sold before it can be taxable. That was not held in the case of subsidies : *Higgs v. Wrightson* (3) and *Lincolnshire Sugar Co., Ltd. v. Smart* (4). This is like the subsidy cases. If no contribution by any person who was not a customer could be taken into account as a trading receipt that would strike any subsidy out of the accounts. In the case of a water undertaking, the owners of a big factory, wishing to have water in a certain district, not for their own use but for use in houses which they proposed to provide for their workers, might promise to pay the undertaking 2,000*l.* a year. Though they were not customers, that would be a trading receipt. Further, the fact that the appellants had already charged the maximum price for their water has nothing to do with the matter. Finally, if the contributions made by the urban district councils are not properly to be included in the trade receipts the payments made by the appellants to the Taf Fechan Water Supply Board ought not to be deducted as expenses in earning the profits of the appellants.

Tucker K.C. in reply. The sums in question were not trading

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(1) (1908) 6 Tax Cas. 508.

(3) (1944) 171 L. T. 185.

(2) (1875) 2 R. 798; 1 Tax Cas. 28.

(4) [1937] A. C. 697, 704.

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receipts. *Glasgow Corporation Water Commissioners v. Inland Revenue Solicitor* (1) governs this case and a decision adverse to the appellants must necessarily involve overruling it. The effect of the appellants' submission is not to exclude subsidies from the category of trading receipts, since they are not the same thing as sums raised out of the rates to meet the outgoings of the rating authority in trading activities carried on by it. Such sums are not income of the rating authority for any purpose. Money raised by precept does not differ in its nature from money raised by a rate. On the other hand subsidies raised by means of the rates to meet private trading activities are trading receipts. The subsidies paid in *Lincolnshire Sugar Co., Ltd. v. Smart* (2) and *Higgs v. Wrightson* (3) were paid in respect of private trading activities.

THE HOUSE took time for consideration.

Mar. 29. VISCOUNT SIMON. My Lords, I have had the advantage of considering the opinion which my noble and learned friend Lord Thankerton is about to deliver, in which he has fully set out the facts in this case, and has examined and analysed the authorities. I agree with his conclusion and will limit myself to a brief statement of two contrasted propositions: the real question in the appeal seems to me to be under which of these two propositions the present case falls. The first proposition is that, subject to the exception hereafter mentioned, payments in the nature of a subsidy from public funds made to an undertaker to assist in carrying on the undertaker's trade or business are trading receipts, i.e., are to be brought into account in arriving at the balance of profits or gains under case I. of sch. D. It is sufficient to cite the decision of this House in the sugar-beet case, *Lincolnshire Sugar Co., Ltd. v. Smart* (2), as an illustration. The second proposition constitutes an exception. If the undertaker is a rating authority and the subsidy is the proceeds of rates imposed by it or comes from a fund belonging to the authority, the identity of the source with the recipient prevents any question of profits arising—see, for example, Lord Buckmaster's explanation in *Forth Conservancy Board v. Inland Revenue Commissioners* (4), and compare what Lord Macmillan said in *Municipal Mutual*

(1) (1875) 2 R. 708; 1 Tax Cas. 28

(2) [1937] A. C. 697.

(3) 171 L. T. 185.

(4) [1931] A. C. 540, 546.

Insurance, Ltd. v. Hills (1). Lord Thankerton has conclusively demonstrated that Lord President Inglis' decision in the first Glasgow water case, *Glasgow Corporation Water Commissioners v. Inland Revenue Solicitor* (2), falls within this second proposition; so interpreted, it was rightly decided, but it does not help the appellants. The precepts which the appellants issued called for lump sums to be contributed by the two urban district councils which they might pay either from their respective district funds or by levying rates. They were not agents for the appellants in finding the money, but distinct parties. It is true that if either of the councils did not provide the money, the appellants, instead of suing it, might itself by precept empower an officer of their own to raise the necessary amount by levying a rate in place of the defaulting authority, but the substance of the matter is that there is no such identity between contributors and recipients as removes the appellants from the application of the first proposition set out above. I move that the appeal be dismissed with costs.

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LORD THANKERTON. My Lords, the subject-matter of this appeal arises upon an assessment made upon the appellant board under case I. of sch. D. of the Income Tax Act, 1918, in the estimated sum of 10,000*l.* for the year 1939-1940 in respect of the profits of its trade, which was that of an undertaking for the supply of water. The only question argued before this House was whether certain sums paid, under precept, to the appellant board by the Pontypridd Urban District Council and the Rhondda Urban District Council under s. 91 of the Pontypridd and Rhondda Water Act, 1910, fall to be included as receipts in the computation of the appellant board's trade profits. The Commissioners for General Purposes of the Income Tax for the Division of Miskin in the county of Glamorgan held that these sums received under precept were not trading receipts and should not be included, and, on the requisition of the Crown, stated a case for the opinion of the High Court of Justice. It may be mentioned that there was also a dispute as to whether a sum paid by the appellant board to the Taf Fechan Water Supply Board should be allowed as a deduction; the General Commissioners held that it should be so allowed, and this conclusion was affirmed in the King's Bench Division and in the Court of Appeal, and the Crown did not press for its disallowance before

(1) (1932) 16 Tax Cas. 430, 448. (2) 2 R. 708; 1 Tax Cas. 28.

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this House. That point accordingly requires no further mention. On appeal, the decision of the General Commissioners that the sums received under precept by the appellant board were not trading receipts and should not be included in the computation of profits was affirmed by Macnaghten J., but an appeal by the Crown to the Court of Appeal was allowed, and it was held that the sums in question were trading receipts and should enter into computation. Hence this appeal by the appellant board. Counsel for the appellant board referred to reasons Nos. 6 and 7 of the appellant's case as embodying his main contentions. These are: (6.) "where a local authority "carries on a commercial undertaking at a loss, and is permitted to make good that loss by a compulsory rate levied on "the ratepayers, the amount of the rate so raised is not a "receipt of the local authority's said trade," and (7.) "the "board's position in respect of the sum raised by precept to "meet its trading losses is similar to that of a local authority, "its 'ratepayers' being either the two councils, the Rhondda "Urban District Council and the Pontypridd Urban District "Council as its constituent authorities, or the individual "ratepayers of those two districts." The question at issue is whether the sums thus received under precept to meet an estimated deficiency in the result of what are admittedly trading activities, fall to be taken into account in computing the profits and gains of the appellant board's trade under case I. of sch. D. Mr. Tucker, for the appellant board, submitted, in the first place, that the amounts of the precepts were not to be included among its trade receipts, in view of the decision in the case usually referred to as the first Glasgow case—*Glasgow Corporation Water Commissioners v. Inland Revenue Solicitor* (1)—with which he maintained the present case was in *pari casu*. In the second place, Mr. Tucker contended that the sums in question were not trade receipts (a) on general grounds, and (b) that they were in exactly the same category as a local rate raised by a public body for the assistance of an undertaking carried on by that body, which is entitled to have such assistance.

My Lords, the first of these contentions appears to me to involve the question, whether the appellant board is entitled to the benefit of the well recognized principle of the exemption of public rating authorities from taxation in respect of the surplus of rates, which is defined by Lord Buckmaster in *Forth Conser-*

vancy Board v. Inland Revenue Commissioners (1), as follows :
 “ The principle of exemption for the surplus of rates is, I think,
 “ to be found in this, that the rating authority collects money
 “ from the inhabitants of the district for the purpose of appli-
 “ cation to the expenses incurred on behalf of the inhabitants,
 “ and that any surplus rightly belongs to the inhabitants
 “ themselves, who receive its benefits in case of any surplus,
 “ because it is carried forward towards the expenses of the
 “ ensuing year.” This principle had already been recognized
 before the first *Glasgow* case (2) in *Attorney-General v. Black* (3),
 in which it was admitted by the Crown that a tax imposed by
 the community on themselves did not involve liability to income
 tax (4), and, in the Exchequer Chamber, Keating J. said (5):
 “ Mr. Manisty does not contend that harbour and port dues,
 “ and other revenues of that description, are not taxable;
 “ and the Attorney-General admits that a district rate is not.
 “ The question then is, does the rate in question partake more of
 “ the nature of the one or of the other? I am of opinion that it
 “ does not partake of the character of a district rate imposed
 “ by the inhabitants of a place upon themselves; and that, on
 “ the other hand, it is very difficult to distinguish it from
 “ harbour dues.” It will be found that this same principle was
 applied in the first *Glasgow* case (2), which was decided four
 years later, and to which I will now return. The Glasgow Water
 Commissioners were created as a statutory corporation, according
 to the law of Scotland, by the local Glasgow Corporation Water-
 works Act, 1855, (18 & 19 Vict., cap. CXVIII.), by s. 6 of which
 it was provided—“ The Magistrates and Council of the City of
 “ Glasgow and their successors in office for the time being, as
 “ representing and for and on behalf of the Community of the
 “ said City, are hereby appointed Commissioners for executing
 “ and carrying into effect the purposes of this Act.” They
 were required to furnish the City of Glasgow, i.e., within the
 municipal boundaries, with a supply of water for domestic
 purposes (s. 84), and to erect thirty-two public fountains
 within those boundaries which formed the limits of compulsory
 supply (s. 88). They were empowered also to deal with parties
 outside the compulsory limits (s. 86). Within the limits of
 compulsory supply the commissioners were entitled to levy two
 rates, (a) a domestic water rate, levied on the occupiers of all

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(1) [1931] A. C. 540, 546.

(4) Ibid. 83.

(2) 2 R. 708; 1 Tax Cas. 28.

(5) Ibid. 311.

(3) (1871) L. R. 6 Ex. 78, 308.

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dwelling-houses within the area, according to their rents (s. 90), and (b) a public water rate not exceeding a penny in the pound on the full annual value of all premises whatever within the same limits (s. 91). Both these rates were payable irrespective of whether the ratepayers chose to use the water or not. After meeting the current expenses of the undertaking, interest on borrowed money and sinking fund charges, the commissioners were required to apply any surplus in reduction of the domestic water rate for the following year (s. 92). Having been assessed to income tax for the year 1872-1873 in respect of profits to the amount of 17,032*l.* 15*s.*, arising upon their undertaking, the Water Commissioners' appeal was refused by the Commissioners of Property and Income Tax for the City of Glasgow, and a case stated by them came before the First Division of the Court of Session, which allowed the appeal. Lord President Inglis (1) said: " Now, the sum of 17,032*l.* 15*s.*, upon which the charge " is made under sch. D. of the Income Tax Act, comprehends " the whole portion of the revenue of the water commissioners " which is applied towards the formation of the sinking fund " in redemption of the annuities and mortgages in the manner " that I have already mentioned, and also the balance, if any, " which is carried forward to the following year's account, to be " applied as the Act directs in reducing the domestic water rate; " and the question is, whether income arising from this assess- " ment, which is appropriated to such purposes, is assessable " for income tax under sch. D. as profits of this undertaking. " I am humbly of opinion that it is not. It seems to me that " this is an Act of Parliament by which the citizens of Glasgow " have undertaken, through this water corporation as their " representatives, to assess themselves for a very important " public purpose—a purpose very conducive to their own " comfort and well-being—to obtain a good supply of water for " the city. In so assessing themselves they had not in view " certainly to make profit by the undertaking. On the contrary " what they have distinctly in view is to pay money in order to " obtain this particular benefit. They are not therefore trading " in any commodity, nor are they entering into any undertaking " for the use of property that is to be attended by a resulting " profit, or a beneficial interest accruing to any individuals, or " to any corporation. The object of the assessment is to pay " for bringing in the water, and when that is done the assess- " ment and the authority to levy it come to an end." The

(1) 2 R. 708, 712; 1 Tax Cas. 28, 48.

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Lord President (1) then distinguished the case from the case of *Attorney-General v. Black* (2), and *Attorney-General v. Scott* (3) : " The case is entirely different from those that have been cited " which have been decided in the Court of Exchequer in " England, because in those cases the statute which gave the " right to levy the assessment did not impose it upon the citizens " of the particular burgh or locality which obtained the Act. " It was not an authority to the citizens of a particular locality " to assess themselves." The learned judge then made the reservation which led to the second *Glasgow* case, *Glasgow Corporation Water Commissioners v. Miller* (4) : " I have " only further to say, that if any attempt had been made here " to discriminate between that portion of the revenue which " arises from the rates levied within the limits of compulsory " supply and that portion of the revenue which is raised in the " districts beyond the limits of compulsory supply I should have " been very glad to attend to any grounds which might have " been urged for such a distinction." The taxability of profits in respect of the extraneous sources of revenue was raised in *Glasgow Corporation Water Commissioners v. Miller* (4), in which it was held that, while the rates levied within the compulsory area were to be regarded as sums levied to defray the cost of the water supply within the district, so that any surplus remaining over could not be regarded as profit, any surplus of rates above outlay collected beyond the compulsory area, or from sales to manufacturers, was profit, which went to reduce the cost of water supply to those within the compulsory area, and was liable to assessment for income tax under sch. D. Referring to the decision in the earlier case, Lord President Inglis, in delivering the judgment of the court said (5) : " We " were all of opinion that within the limits of compulsory " supply the concern or undertaking as defined by the local Act, " was of this nature, that the citizens of Glasgow undertook to " assess themselves for accomplishing the important public " purpose of supplying the city (being the limits of compulsory " supply) with a good supply of pure water ; that in doing so " they had and could have no view of making profit, for that " would have been equivalent to paying out of one pocket and " into another pocket of the same individual or class ; that they " paid these assessments for no other purpose than that of

(1) 2 R. 713 ; 1 Tax Cas. 49.

(2) L. R. 6 Ex. 78, 308.

(3) (1873) 28 L. T. 302.

(4) (1886) 13 R. 489 ; 2 Tax Cas. 131.

(5) Ibid. 492 ; 140.

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“ obtaining the particular contemplated benefit, and when that benefit is fully attained and secured for the future the assessment and the authority to levy it come to an end. I have reconsidered that judgment, and have not seen any reason to doubt its soundness.” The significant features of the *Glasgow* case (1) were that (1.) the water commissioners were expressly appointed “ as representing and for and on behalf of “ the community of the ” city of Glasgow, which formed the area of compulsory supply ; (2.) the Commissioners had the power of levying the domestic and public rates direct on the ratepayers within the compulsory area, and, quoad these rates, the ratepayers were ratepayers of the Commissioners and not of the municipal corporation ; (3.) these rates were payable whether the particular ratepayer chose to use the water or not ; (4.) no price was paid by any domestic consumer for his particular supply and he did not enter into any trading transaction with the Commissioners ; (5.) the rates thus levied were applied to the expenses incurred on behalf of the inhabitants, and any surplus rightly belonged to the ratepayers, and was carried forward and applied in reduction of the domestic rate in the next year, thus answering Lord Buckmaster’s definition of the principle. On the other hand, the present case is very different : The appellant board (1.) are not directly representative of the inhabitants of the Rhondda and Pontypridd Urban District Councils ; (2.) their limits of supply do not include the whole of the Rhondda Urban District ; (3.) they have no power to levy a rate, except on default of a constituent authority ; (4.) the sums obtained by precepts under s. 91 are not the expense of obtaining a benefit for the inhabitants of the compulsory area, but are designed to meet a deficiency arising out of the insufficiency of their admitted trading receipts to cover their trading transactions with the individual consumers within the limits of supply, and their sales in bulk—in other words, to make good their loss in trading ; (5.) in view of sub-s. 4 of s. 91, these sums are not necessarily paid out of the proceeds of any rate ; and (6.) there is no provision for a public rate, and it would appear that if a constituent authority needed water for any of the purposes usually covered by a public water rate, it would need to enter into a trading transaction with the Board. In all these respects the present case is in strong contrast to the first *Glasgow* case (1). It is true that in the case of the *Forth Conservancy Board* (2) Lord Buckmaster, while finding it

(1) 2 R. 708 ; 1 Tax Cas. 28.

(2) [1931] A. C. 540, 547.

unnecessary for the purposes of that case to examine the soundness of the decision in the first *Glasgow* case (1), said it appeared difficult to reconcile it with the later decision in this House in *Mersey Docks and Harbour Board v. Lucas* (2), and Lord Dunedin (3) expressed a similar doubt. I did not share these doubts, and, as I pointed out (4) Lord President Inglis had the *Mersey Docks* case (2) before him in the second *Glasgow* case (5) and reaffirmed his decision in the first case, and the judgment delivered by Lord President Inglis was the judgment of the court, and in the *Mersey Docks* case (2), two out of the three noble and learned Lords who took part in the decision referred to the first *Glasgow* case (1): Lord Blackburn (6) approved of the principle on which the Court of Session acted, though not having the *Glasgow* Act before him, he was not able to say whether a proper construction had been put on it. Lord FitzGerald (7) clearly found no inconsistency between the decision in the *Glasgow* case (1) and the decision in the *Mersey Docks* case (2). Having again considered the matter, I am unable to find any inconsistency between the decisions in these two cases.

Mr. Tucker's claim to come within the principle of the first *Glasgow* case (1) not only fails, in my opinion, but in stating the various points of contrast between the provisions of the *Glasgow* Water Act and the provisions of the appellant board's Water Act, the various matters I have indicated in respect of the latter Act, go far to show that the amount of the precepts are not in the position claimed under head (b) of Mr. Tucker's second contention, viz., that they were in exactly the same category as a local rate raised by a public body for the assistance of an undertaking carried on by that body, which is entitled to have such assistance. But I will deal first with head (a) of Mr. Tucker's second contention, by which he contended on general grounds that the sums in question were not trade receipts; in regard to this contention he cited two cases, the first of which was *Seaham Harbour Dock Co. v. Crook* (8), which was decided by this House in 1931. The *Seaham Harbour Dock Co.* had applied for and obtained grants from the Unemployment Grants Committee, from funds appropriated

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(1) 2 R. 708; 1 Tax Cas. 28.

(2) 8 App. Cas. 891.

(3) [1931] A. C. 540, 549.

(4) Ibid. 555.

(5) 13 R. 489; 2 Tax Cas. 131.

(6) 8 App. Cas. 891, 911.

(7) Ibid. 913.

(8) (1931) 16 Tax Cas. 333.

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(1) 16 Tax Cas. 353.

(3) Ibid. 704.

(2) [1937] A. C. 697.

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the Court of Appeal. Accordingly I am of opinion that the appeal should be dismissed with costs, and that the order of the Court of Appeal should be affirmed.

My Lords I have been asked by my noble and learned friend LORD PORTER to say that he concurs in the opinions which have been delivered.

LORD WRIGHT (read by LORD THANKERTON). My Lords, I agree with the speech which has just been delivered by my noble and learned friend Lord Simon, and do not desire to add anything to it.

LORD SIMONDS. My Lords, I concur.

Appeal dismissed.

Solicitors for appellants: *Theodore Goddard & Co., for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

Dictum of LORD SIMONDS, at p. 505, doubted by LORD DU PARCQ, CARROLL v. ANDREW BARCLAY & SONS, LTD. [1948] 2 All E.R. 386.

[HOUSE OF LORDS.]

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NICHOLLS APPELLANT ;

AND

F. AUSTIN (LEYTON), LIMITED, . . . RESPONDENTS.

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Mar. 12, 14;
April 12.

Factory Acts—Dangerous machinery—Fencing—Circular saw—Fragments of wood thrown from machine—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 14, sub-s. 1.

By s. 14, sub-s. 1, of the Factories Act, 1937: "Every dangerous "part of any machinery . . . shall be securely fenced." The last paragraph of s. 14 gave the Secretary of State power to "make regulations requiring the fencing of materials or articles "which are dangerous while in motion in the machine" but none had been made.

The appellant, while operating a circular saw belonging to her employers, the respondents, was injured through a piece of wood flying out of the machine which was fenced so as to comply with the requirements of the Woodworking Machinery Regulations, 1922, which by s. 150 of the Act were to be deemed to have been made under that Act.

* *Present*: LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, LORD SIMONDS AND LORD UTHWATT.

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Held, that the respondents were not in breach of any statutory obligation, since the obligation to fence imposed by s. 14, sub-s. 1, was an obligation to guard against contact with any dangerous part of a machine and not to guard against dangerous materials ejected from it, a matter depending solely on the making of regulations under the discretionary power conferred by s. 14, sub-s. 3, on the Secretary of State and not exercised by him.

Decision of the Court of Appeal [1945] K. B. 50, affirmed.

The facts stated by LORD THANKERTON, LORD WRIGHT and LORD SIMONDS were as follows: The appellant, a young woman, was at all material times employed as a factory hand at the factory of the respondents. On May 29, 1943, while employed at a woodworking machine known as a straight line edger, she sustained injury to the ring and middle fingers of her left hand, the middle finger being severely injured by reason of a small laceration or abrasion which subsequently turned septic, though it did not appear how. The machine in question consisted of a circular saw fitted on a table, and driven by an electric motor. The front edge of the saw was about two feet from the front of the table at which the operator stood to push the wood to be worked on to a mechanical conveyor driven by a separate gearing. The wood was conveyed from the front of the table, which was thirty-eight inches from the floor level, towards the cutting edge of the saw by the conveyor and by rollers which assisted it. There was a metal hood over the whole of the rollers, conveyors and circular saw. In front of the machine there was a self-adjusting guard in the form of a row of small objects called metal fingers, a little above the level of the table and resting on the top of the ingoing wood. There was a space of about four inches between the bottom edge of the hood and the surface of the table. This gap might be reduced by the depth of the ingoing slab. At the time of the accident the appellant was engaged in feeding into the machine wooden slabs about twelve inches to fifteen inches long, about nine inches wide and two inches deep, which were being cut into strips for chair bearings. No one could speak as to the exact nature or size or shape of the object which struck her hand, since no witness saw it or from whence it came. There was evidence that very small pieces, or slivers, of wood did fly out of the machine in front but no evidence that they had caused injury to anyone. Evidently the appellant's hand was struck by an offcut from the left-hand edge of a slab of wood. The appellant said

that it might have flown through the metal fingers or, as probably happened, through the space at the left-hand side of the machine between the bottom of the hood and the surface of the table. The appellant did not put her hand anywhere near the saw nor had she any need to do so. There was no suggestion of contributory negligence on her part. She brought an action against the respondents claiming damages, alleging negligence and/or breach of statutory duty. Stable J. awarded her 350*l.*, holding that the respondents had been guilty of a breach of duty under s. 14, sub-s. 1, of the Factories Act, 1937. He held that the fencing complied with the Woodworking Machinery Regulations, 1922, reg. 10. He did not find whether or not the respondents had been guilty of negligence. The Court of Appeal, reversing this decision, held that reg. 10 modified s. 14 of the Act of 1937 and, accordingly, that the respondents had not committed a breach of a statutory obligation and were not liable to the appellant.

The appellant appealed to the House of Lords.

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Sir Charles Doughty K.C. and *Edgedale* for the appellant. The respondents were guilty of a breach of the statutory duty imposed by s. 14, sub-s. 1, of the Act of 1937, whereby the appellant's injuries were caused. The breach consisted of their failure to fence the saw so as to obviate the danger of material which was being worked from being ejected by the machine and causing injury. Part of the saw revolving at a very high speed came in contact with the wood and imparted to it a violent motion and this was not securely fenced. An animal which throws dangerous things at one is just as dangerous as an animal which bites one. In the same way a part of a machine which throws out dangerous things at one is just as dangerous as a part that cuts one. A machine otherwise perfectly harmless would be dangerous if it threw off a highly corrosive liquid which settled round the wheels. Parts of a machine can be dangerous in different ways. A machine is dangerous if it is dangerous in the ordinary course of human affairs: see *Walker v. Bletchley Flettons, Ltd.* (1); *Davis v. Thomas Owen & Co., Ltd.* (2); *Lewis v. Denye* (3); and *Hindle v. Birtwhistle* (4). Thus the phrase "every "dangerous part" in s. 14, sub-s. 1, includes parts which are indirectly dangerous in that they may throw out material

(1) [1937] 1 All E. R. 170, 175.

(3) [1940] A. C. 921.

(2) [1919] 2 K. B. 39.

(4) [1897] 1 Q. B. 192.

H. L. (E.) with such force as to cause injury. Further, the proviso to sub-s. 1 demands that one should imply certain words since the phrase "safety of a dangerous part" really means the safety of a person. It should be understood as "safety of a person from coming in contact with a dangerous part." Moreover, sub-s. 2 (a), which only deals with "the exposure of a dangerous part" is not necessarily exclusive of sub-s. 1. The phrase in sub-s. 3 "materials or articles which are dangerous while in motion in the machine" does not cover those materials or articles only while they are in the machine. *Miller v. William Boothman & Sons, Ltd.* (1), was wrongly decided and accordingly the fact that the fencing in this case complied with the Woodworking Machinery Regulations, 1922, is no bar to the success of the appellant's claim under s. 14, sub-s. 1. They were supplementary to and not in modification of the Factory and Workshop Act, 1901, and the Factories Act, 1937, in that the Secretary of State under s. 79 of the Act of 1901 had no power to modify that Act, nor has he any such power of modification under s. 159 of the Act of 1937. Regulations made could only extend or develop the Act; they could not modify it. See the powers given to the Secretary of State to make regulations under ss. 3, 4, 5, 7, 11, 38, 50, 56, 60, 86 and 88 of the Factories Act, 1937. Apart from the Act, however, the respondents were guilty of common law negligence in supplying a machine which was dangerous and unsafe because pieces of wood flew out of it frequently with very great force: see *Wilsons & Clyde Coal Co., Ltd. v. English* (2).

[LORD THANKERTON intimated that the House did not require to hear argument from the respondents on the point of common law negligence.]

Beney K.C. and *R. Everett* for the respondents. The respondents were not guilty of any breach of a statutory obligation because s. 14, sub-s. 1, of the Factories Act, 1937, requires only the fencing of such parts of the machine as are dangerous and not of material which is being worked in the machine and becomes dangerous through its motion in the machine. If the contention of the appellant were right a machine throwing off a drop of oil into a workman's eye would be dangerous.

THE HOUSE took time for consideration.

(1) [1944] K. B. 337.

(2) [1938] A. C. 57.

April 12. LORD THANKERTON. My Lords, although the appellant originally maintained that the fencing of the circular saw did not comply with reg. 10 of the Woodworking Machinery Regulations, 1922 (St. R. & O. 1922, No. 1196), and that the respondents were therefore in breach of their statutory duty thereunder, this contention was negatived by Stable J., who tried the case, and was not maintained in the Court of Appeal or before this House. The main case of the appellant rests on an alleged breach by the respondents of a statutory duty imposed on them by s. 14 of the Factories Act, 1937, in that they failed to fence the saw so as to prevent the danger of material which was being operated on being ejected by the machine and causing injury. Alternatively, the appellant seeks to impose liability on the respondents at common law, in respect of their negligence in supplying improper plant, by supplying a machine which was dangerous and unsafe. Section 14 of the Factories Act, 1937, provides as follows :—” (1.) Every dangerous part
 “ of any machinery, other than prime movers and transmission
 “ machinery, shall be securely fenced unless it is in such
 “ a position or of such construction as to be as safe to every
 “ person employed or working on the premises as it would be if
 “ securely fenced : Provided that, in so far as the safety of
 “ a dangerous part of any machinery cannot by reason of the
 “ nature of the operation be secured by means of a fixed guard,
 “ the requirements of this subsection shall be deemed to have
 “ been complied with if a device is provided which auto-
 “ matically prevents the operator from coming into contact
 “ with that part. (2.) Where the Secretary of State is satisfied
 “ that there is available and suitable for use in connexion with
 “ machinery of any class any type or description of safety
 “ device which—(a) prevents the exposure of a dangerous part
 “ of machinery whilst in motion ; or (b) stops a machine
 “ forthwith in case of danger, he may make regulations
 “ directing that the type or description of device shall be
 “ provided for use in connexion with such class of machinery
 “ as may be specified in the regulations : Provided that, in
 “ any proceedings in respect of a contravention of this sub-
 “ section, it shall be a sufficient defence to prove that a device
 “ at least equally effective was being used in connexion with
 “ the machinery in respect of which the contravention occurred.
 “ (3.) Any part of a stock-bar which projects beyond the
 “ head-stock of a lathe shall be securely fenced unless it is in
 “ such a position as to be as safe to every person employed or

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H. L. (E.) “ working on the premises as it would be if securely fenced.
 1946 “ The Secretary of State may, as respects any machine or any
 NICHOLLS “ process in which a machine is used, make regulations requir-
 v. “ ing the fencing of materials or articles which are dangerous
 F. AUSTIN “ while in motion in the machine ” The Woodworking
 (LEYTON), Machinery Regulations, 1922, were made under s. 79 of the
 LD. Factory and Workshop Act, 1901, which Act was repealed
 Lord “ by the Factories Act, 1937, but by s. 159, sub-s. 1, of the Act
 Thankerton. of 1937, it was provided that any regulation made “ under any
 “ enactment repealed by this Act which is in force at the com-
 “ mencement of this Act shall continue in force and shall have
 “ effect as though it had been made under this Act,
 “ and, in so far as it could have been made under
 “ a particular provision of this Act, shall be deemed to have
 “ been made under that provision ” Section 60
 of the Act of 1937 gives a general power to the Secretary of
 State to make special regulations for safety or health, and under
 sub-s. 2 (c) it is provided that such regulations may “ modify
 “ or extend with respect to any class or description of factory
 “ any provisions of Part I, Part II or this Part of this Act,
 “ being provisions imposing requirements as to health or
 “ safety,” which include s. 14 of the Act.

At the trial, the first point argued before the learned judge was whether the obligation to fence imposed by sub-s. 1 of s. 14, is an obligation not only to protect against direct injury by contact with the machine, but also against indirect injury from something that flies off from the machine. The learned judge accepted the wider construction. The second point was whether the result of the provisions of s. 60, sub-s. 2 (c) as to modification of the provisions of the Act was that the Woodworking Machinery Regulations, 1922, in effect became substituted for s. 14, so that compliance with the regulations operated as a discharge of the obligations imposed by s. 14. The respondents maintained that the regulations did so operate, and that it had been so decided by the Court of Appeal in *Miller v. William Boothman & Sons, Ltd.* (1). In that case a workman had had his thumb taken off by the cutting edge of a circular saw ; the saw was fitted with a guard of the best standard pattern in existence which complied with reg. 10 of the Woodworking Machinery Regulations, 1922, but, of necessity, part of the cutting edge of the saw was exposed when in use. It was admitted that reg. 10 had been complied with,

and the Court of Appeal held that reg. 10, modified the provisions of sub-s. 1 of s. 14, and that the defendants had not committed a breach of a statutory obligation. The learned judge distinguished the case of *Miller* (1) from the present case, on the ground that in *Miller's* case (1) they were dealing with the direct danger from the cutting edge of the saw, against which the regulation had specifically prescribed the dimensions and nature of the guard to be provided, whereas, in the present case, the regulations were silent about the indirect danger of bits of wood thrown out at the side of the machine. The learned judge, accordingly, held that the respondents were under the obligation to fence securely imposed by sub-s. 1, of s. 14; that there would be no practical difficulty in providing a perfectly satisfactory guard to prevent the pieces of wood from flying out; and that they were in breach of their statutory obligation. He awarded the appellant 350*l.* in name of damages. The Court of Appeal reversed this decision, holding that the decision in *Miller's* case (1) was not distinguishable. MacKinnon L.J. said (2): "It seems to me clear, so far as the statement of claim in this case alleges breaches of the statutory duty imposed by the Act of 1937, it being admitted that the defendants fully complied with the requirements of the regulations of 1922, any attempt to say that there was any surviving or additional duty put on them by s. 14 is erroneous and is not justified having regard to that decision of this court." Lawrence L.J. and Cassels J. agreed. The learned judges of the Court of Appeal appear to have assumed that sub-s. 1 of s. 14 included protection against danger from portions of wood ejected from the machine.

My Lords, on consideration of the terms of s. 14, I am of opinion that there is a simpler answer to the contention of the appellant, namely, that the obligation to fence imposed by sub-s. 1 is an obligation to provide a guard against contact with any dangerous part of a machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion, that matter depending solely on the making of regulations by the Secretary of State under the discretionary power conferred on him by the last paragraph of the section. This view appears to be amply confirmed by the language used. In the first place, sub-s. 1 is dealing with fencing of dangerous parts of any machine, and

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not with dangerous machines, whereas the dangerous materials or articles do not necessarily emanate from a dangerous part of a machine ; further, the reference to the exception where the position or construction is such that it is as safe to every person employed or working on the premises as it would be if securely fenced suggests safety from contact with the dangerous part, and this is stated in terms at the end of the proviso to sub-s. 1. Secondly, sub-s. 2 (a) continues the same idea of guarding against contact by referring to prevention of the exposure of a dangerous part. Thirdly, the last paragraph of the section appears finally to put the proper construction of the section beyond doubt, in that it does not refer to parts of machinery which are dangerous because they eject materials or articles in such a manner that they are liable to cause injury but it is the materials that are characterized as dangerous. I will only add that if sub-s. 1 was intended to include fencing against the ejection of materials or articles, I would not expect to have two separate provisions for the making of regulations, or to have the second one in a separate general paragraph at the end of the section, instead of in a sub-section of its own, for the last paragraph of the section is clearly not part of sub-s. 3. It being admitted that no regulations have been made under the last paragraph of s. 14, I am of opinion that there is no obligation imposed by s. 14 on the respondents as regards these flying bits of wood, and therefore they are not in breach of any statutory obligation, and the appellant's main contention fails. I should add that this conclusion renders it unnecessary to deal with the decision in *Miller's* case (1) and I express no view on its correctness. On the appellant's alternative claim at common law, I am of opinion that no case has been made out. The learned judge made no finding that there was common law negligence, and I agree with the comments of MacKinnon L.J. and Lawrence L.J. as to the absence of any adequate evidence on this aspect of the case. In my opinion the appeal fails and should be dismissed with costs, and the order of the Court of Appeal should be affirmed.

LORD MACMILLAN. My Lords, the appellant while operating a circular saw was struck by a fragment which flew off from a block of wood which she was engaged in cutting into strips and thereby suffered injury to her hand. She sues her

employers, the respondents, for damages on the ground that, in breach of their statutory duty under s. 14 of the Factories Act, 1937, they failed so to fence the circular saw as to prevent fragments of wood flying off and striking the operator. It is not quite clear how the fragment of wood which struck the appellant flew out but it was probably thrown off through a space between the hood covering the saw and the table. The question of importance in the case is whether the statutory duty imposed by s. 14 of the Act of 1937 to fence securely every dangerous part of any machinery is fulfilled when the dangerous part is so fenced as to prevent the operator from coming into contact with it ; or whether the duty also extends to fencing the dangerous part so as to prevent any part of the material on which the machine is working from flying off and striking the operator. The circular saw was admittedly a dangerous part of the woodworking machine which the appellant was operating. It was therefore the duty of the respondents securely to fence it. They observed and indeed more than observed all the requirements of the Woodworking Machinery Regulations, 1922, under the Act for the fencing of circular saws. But the fencing did not prevent a fragment of wood flying off while the saw was working. Was it the statutory duty of the respondents so to fence the saw as to prevent this possibility ? In my opinion the statute imposes no such duty. The obligation under s. 14 to fence the dangerous part of a machine, as I read it, is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it, and this obligation was in the present instance amply fulfilled. That this is the correct reading of the statute is made plain by the proviso to s. 14, sub-s. 1, which enacts that " in so far as the safety " of a dangerous part of any machinery cannot by reason of " the nature of the operation be secured by means of a fixed " guard, the requirement of this subsection shall be deemed to " have been complied with if a device is provided which " automatically prevents the operator from coming into " contact with that part." Moreover the statute clearly recognizes the distinction between danger arising from the operation of the machine itself and danger arising from the material on which the machine is operating, for in sub-s. 3 of s. 14 it empowers the Secretary of State " as respects any " machine or any process in which a machine is used," to " make regulations requiring the fencing of materials or articles

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“ which are dangerous while in motion in the machine.” No such regulations have been made and in the absence of any such regulations there is no statutory duty to fence materials or articles which are dangerous while in motion in a machine. The accident suffered by the appellant was accordingly in my opinion not due to any breach by the respondents of any statutory duty incumbent upon them. On my reading of the statute it becomes unnecessary to consider the question whether the observance by the respondents of all the requirements of the Woodworking Machinery Regulations under the statute exhausted their duty to fence under s. 14, sub-s. 1, as was held by the Court of Appeal in the present case, following the decision in *Miller v. William Boothman & Sons, Ltd.* (1), and I therefore express no opinion on this topic. The appellant also pleaded that the respondents had been guilty of negligence at common law. I agree with the Court of Appeal that the evidence entirely fails to support any such case. The appeal should be dismissed.

LORD WRIGHT (read by LORD SIMONDS). My Lords, I agree that the appeal should be dismissed. I shall merely add a few observations on my own part to explain why I do so. The appellant based her claim on s. 14 of the Factories Act, 1937, of which she said there was a breach and also on reg. 10 of the Woodworking Machinery Regulations, 1922 ; she further said there was a breach of the common law duty. In my opinion she has failed on each head.

Section 14 of the Factories Act, 1937, requires that *every dangerous part* of any machinery, other than prime movers and transmission machinery shall be securely fenced. The full terms of the section are before your Lordships and I need not repeat them. But it is essential to note that the governing words are “ every dangerous part of any machinery.” The appellant has been unable to point to any part of the machine that could satisfy the description of a dangerous part, that is, excluding such parts as were securely fenced. Thus it is clear that the requirements of the Woodworking Machinery Regulations, 1922, were satisfied. Those regulations were issued under the Factory and Workshop Act, 1901, which preceded the Act of 1937, but were made applicable to the later Act by s. 159, sub-s. 1. These regulations deal in particular with circular saws and the like. Section 14 of the

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Act of 1937 does however contain an additional paragraph at the end of sub-s. 3, which is in the following terms: "The Secretary of State may, as respects any machine or any process in which a machine is used, make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine." But no regulations have been made under this clause, which is left in the air. It might indeed have been made use of to prevent the small slivers thrown off by the back of the saw, being at large within the metal case in which the machine works, and coming out and striking the operator. It is not clear why no regulations have been made with this object. Perhaps it has not in experience been found of sufficient importance. But the fact remains that no regulations have been made to give effect to the additional clause appended to sub-s. 3. Hence that clause has remained of no effect in itself at least up to the present. Similarly the wide powers of modifying or extending provisions imposing requirements as to health and safety remain unemployed so far as might affect the particular claim in this case. Section 60, sub-s. 1 (b) does indeed also give power to make regulations to "limit or control the use of any material or process." I am not clear how far the power to make regulations under this would extend, but no regulations material to this case have been referred to. But the additional clause to s. 3, sub-s. 3, does point the contrast between the fencing of dangerous parts of the machine and the fencing of materials and articles which are dangerous while in motion in the machine and is to that extent adverse to the appellant's claim and confirms the construction which the respondent puts on the section. This, I think, is fatal to her claim. In this view of the position, it is not necessary to express any opinion on the soundness of the decision of the Court of Appeal in *Miller v. William Boothman & Sons, Ltd.* (1).

I agree with the reasoning of the Court of Appeal which led them to hold that there was no evidence of breach by the respondents of their common law duty to the appellant. That the common law duty exists in proper cases is unquestionable. But it is limited to reasonable exercise of care and skill to guard against danger which as reasonable people, the employers ought to have anticipated. The injury suffered by the appellant was, it seems, outside normal experience, and such as could not reasonably have been anticipated. That, I think, justifies

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LORD SIMONDS. My Lords, this appeal raises in the first place a short question of construction of s. 14 of the Factories Act, 1937. If that question is decided in favour of the respondents, it becomes unnecessary to consider the further question what is the effect upon that section of certain regulations for the use of woodworking machinery made under the Factory and Workshop Act, 1901, but continued under the Act of 1937. The first question is, I think, correctly stated in the appellant's case in these words: "Whether the words " 'every dangerous part' referred to in s. 14 of the Factories Act, 1937, refer only to parts which are directly dangerous " by reason that the part itself is liable to cause injury so that " such parts only are required to be fenced by the said section, " or whether the said words 'every dangerous part' include " parts which are indirectly dangerous in that they are liable " to throw out material with such force that the material is " liable to cause injury to the worker so that such parts also " are required to be fenced by the said section." My Lords, I have no doubt that this question should be answered by saying that the words "every dangerous part" in their context refer only to parts which are directly dangerous by reason that the part itself is liable to cause injury.

Section 14 follows ss. 12 and 13, the former of which deals with "prime movers" and the latter with "transmission machinery," and itself (by sub-s. 1) provides that "every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced." There follows a proviso which is of great importance, but, apart from the proviso, it seems to me clear that the subsection is dealing with a physical part of a machine, not with its function. Machinery, particularly in motion, is a constant source of danger to the workman as the horrid story of factory accidents proclaims. "Prime movers," "transmission machines," "every dangerous part of any machinery," these in turn are things from which the worker is to be guarded by a secure fence. I find nothing in this language to suggest that the section aims at protecting the worker from any indirect danger arising out of

the functional operation of the machine. If there was any ambiguity, it would be set at rest by the proviso, which provides that "in so far as the safety of a dangerous part cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part." These last six words make it clear that the security at which the substantive part of the subsection aims is security from unintentional or I suppose even intentional contact with a dangerous part. The fence is intended to keep the worker out, not to keep the machine or its product in. To the same conclusion I am led by sub-s. 2, which contemplates the use of a safety device which "(a.) prevents the exposure of a dangerous part of machinery whilst in motion; or (b.) stops a machine forthwith in case of danger." These again are expressions which show that the danger to be guarded against is in the contact of worker with machine. Finally, the concluding words of s. 14, which might well be in a separate section, confirm this view. For the Secretary of State is thereby authorized "as respects any machine or any process in which a machine is used" to "make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine." Here a clear distinction is drawn between dangerous parts of the machine and materials or articles. The authority would be superfluous if the danger apprehended by sub-s. 1 included danger not only from contact with a dangerous part but also from the materials which it might discharge. Since the respondents have not in my opinion committed any breach of their statutory duty under s. 14, I find it unnecessary to say anything about the decision of the Court of Appeal in *Miller v. William Boothman & Sons, Ltd.* (1). I will only add that I see no possible ground for holding that the respondents were guilty of negligence at common law. The learned judge who heard the case did not so decide, and having read the evidence that he had before him I am satisfied that he could not properly have come to such a conclusion. I concur in the motion that this appeal should be dismissed.

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LORD UTHWATT. My Lords, the appellant, while operating a machine known as a straight line edger, was injured as a

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result of the ejection by the machine of some of the wood upon which the machine was working. In respect of this injury she claims damages, alleging that the injury was due to a breach by the respondents of a statutory duty arising under the Factories Act, 1937, or alternatively to a breach by the respondents of their common law duty to take proper care to provide a safe system of working. With respect to the first claim, it is argued that there was a breach by the respondents of s. 14, sub-s. 1, of the Factories Act, 1937: that *Miller v. William Boothman & Sons, Ltd.* (1) was wrongly decided: and that accordingly the circumstance that the Woodworking Machinery Regulations, 1922, were duly complied with is no bar to the success of a claim based on sub-s. 1 of s. 14. The first matter to be considered, therefore, is the effect of sub-s. 1 of s. 14. It is not disputed that, apart from the absence of fencing precluding the ejection of material which was being worked upon by the machinery, all dangerous parts of the machinery were duly fenced as required by the subsection. The contention of the appellant is that the phrase "every " dangerous part," in respect of which the obligation to fence is imposed by sub-s. 1 of s. 14, includes parts which are indirectly dangerous in that they are liable to throw out material with such force as to be liable to cause injury to the worker. Acceptance of this contention involves the view—indeed it is the substance of the contention—that the obligation imposed by the subsection is to fence the machine, viewed as a single operating unit, so as to avoid the possibility of danger arising to the worker from its operation. My Lords, in my opinion the sub-section, whether it be read alone or be read in connexion with the other provisions of the Act relating to machinery, negatives the contention. The lines on which the Act—so far as relevant here—proceeds is, not to take into account any machinery as a whole, but to require the several parts of the machinery to be considered separately in light of their construction, position or dangerous nature. Under s. 12 there are to be securely fenced flywheels and (subject to certain exceptions) every moving part of any prime mover, and under s. 13 every part of the transmission machinery, unless it is safe by reason of its position or construction. Section 14, sub-s. 1 applies to "every dangerous part of any machinery " other than prime movers and transmission machinery." That dangerous part is to be securely fenced unless it—i.e.

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the dangerous part—is in such a position or of such construction as to be safe. The proviso to the subsection is of assistance. Where a fixed guard is not practicable as respects a dangerous part, the provision of a device which prevents contact between the operator and that part is to satisfy the obligation contained in the leading provision of the subsection. The prevention of contact between the worker and the dangerous part is to be sufficient. The matter is, I think, put beyond doubt by the circumstance that, under the concluding part of sub-s. 3 of s. 14, power is given to the Secretary of State to make, as respects any machine or process in which a machine is used, “regulations requiring the fencing of materials or articles “which are dangerous while in motion in the machine.” The machine is there treated as a single unit, and materials upon which the machine is operating are included in the subject matter in respect of which regulations may be made. The language of the subsection giving this power precludes one from reading it as enabling the Secretary of State to make regulations directed to working out an obligation arising under sub-s. 1. The presence of the power renders it illegitimate to put the strained construction upon sub-s. 1 for which the appellants contend. In my opinion, therefore, the claim under the Act fails, and in the circumstances it is not necessary to express any opinion as to the correctness of the decision in *Miller v. William Boothman & Sons, Ltd.* (1). As regards the alternative claim, the trial judge, who found in favour of the appellant on her claim under the Factories Act, 1937, expressed no view as to the effect of the evidence. In my opinion—I do not propose to review the evidence—the appellant failed to show that the respondents were guilty of negligence. I would dismiss the appeal.

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*Appeal dismissed.*Solicitors for appellant : *Shaen, Roscoe & Co.*Solicitors for respondents : *Barlow, Lyde & Gilbert.*

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Applied. YACHUK v. OLIVER BLAIS
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J. C.*

[PRIVY COUNCIL.]

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July 30.

SRIMATI BIBHABATI DEVI . . . APPELLANT ;
AND
KUMAR RAMENDRA NARAYAN ROY
AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Appeal to Privy Council—Practice—Rule as to concurrent findings of fact—Propositions applicable—Special circumstances justifying departure from rule.

Limitation—Wife's possession of estate not adverse against husband whom she regarded as dead.

From a review of previous decisions of the Judicial Committee of the Privy Council the following propositions are derived as to the present practice of the Board to decline to review the evidence for a third time where there are concurrent judgments of two courts on a pure question of fact, and as to the nature of the special circumstances which will justify a departure from the practice :—

(1.) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.

(2.) That it applies to the concurrent findings of fact of two courts, and not to concurrent findings of the judges who compose such courts. Therefore a dissent by a member of the appellate court does not obviate the practice.

(3.) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.

(4.) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand ; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

(5.) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6.) That the practice is not a cast-iron one, and the foregoing

* *Present* : LORD THANKERTON, LORD DU PARCQ and SIR MADHAVAN NAIR.

statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7.) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country.

(8.) That the practice relates to the findings of the courts below, which are generally stated in the order of the court, but may be stated as findings on the issues before the court in the judgments, provided that they are directly related to the final decision of the court.

Where the appellant, on the supposed death of her husband—who was in fact alive—had entered on her widow's estate and thereafter enjoyed it for a period exceeding twelve years, her possession was not adverse to her husband, whom she regarded as dead.

Decree of the High Court affirmed.

APPEAL (No. 17 of 1945), by special leave, from a decree of the High Court in its civil appellate jurisdiction (November 25, 1940) which confirmed a judgment and decree of the First Additional District Judge, Dacca (August 24, 1936).

The following facts are taken from the judgment of the Judicial Committee: The present suit was instituted in the Court of the First Subordinate Judge at Dacca on July 24, 1930, by the respondent Kumar Ramendra Narayan Roy (hereinafter referred to as the plaintiff) against the present appellant and others. In the plaint, as subsequently amended on April 15, 1931, the plaintiff sought (*ka.*) a declaration that he was Kumar Ramendra Narayan Roy, the second son of the late Rajah Rajendra Narayan Roy of Bhowal and (*ka. 1*), that his possession should be confirmed in respect of the one-third share of the properties described in the schedule, or, if from the evidence and under the circumstances plaintiff's possession thereof should not be established, then possession thereof should be given to him. He further asked for injunctions against obstruction to his possession. The present appellant filed a written statement denying, *inter alia*, the identity of the plaintiff with Kumar Ramendra Narayan Roy (hereinafter referred to as the second Kumar), and alleging that the suit was barred by limitation. Issues were adjusted, and those now relevant were: 2. Was the suit barred by limitation? 4. Was the second Kumar Ramendra Narayan Roy alive? 5. Was the present plaintiff the second Kumar Ramendra Narayan Roy of Bhowal? After a very long

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trial, lasting for 608 days, the First Additional District Judge delivered an elaborate and careful judgment in favour of the plaintiff on August 24, 1936, and by his order of the same date he ordered and decreed "that it be declared that the plaintiff " is the Kumar Ramendra Narayan Roy, the second son of " the late Rajah Rajendra Narayan Roy, Zemindar of Bhowal, " and that he be put in possession of an undivided one-third " share in the properties in suit—the share now in the enjoy- " ment of the first defendant (the present appellant)—jointly " with the other defendants' possession over the rest." On an appeal by the present appellant, the appeal was heard by a Special Bench of the High Court, consisting of Costello, Biswas and Lodge JJ., and by decree dated November 25 (Lodge J. dissenting) it was ordered and decreed " in accordance " with the opinion of the majority of the judges that the " judgment and decree of the court below be and the same are " hereby affirmed and this appeal dismissed."

The following is a short account of the family history in the judgment of the trial judge :—Rajah Rajendra Narayan Roy, the Zemindar of Bhowal, one of the largest landed proprietors of East Bengal, died on April 26, 1901. The title was personal, but the family was old, and though not entitled to fame, regarded as the premier Hindu Zamindar family of Dacca. The family-seat was at Jaidebpur, a village about twenty miles from Dacca, and situate in the Pargana of Bhowal, a large and fairly compact estate, spreading over the districts of Dacca and Mymensingh. The Rajah had a residence at Dacca, but he ordinarily lived in his family home, and was undoubtedly a local magnate of the highest position and influence. The rent-roll of the estate was Rs.6,48,353 in 1931. It could not have been much less in the Rajah's time.

The Rajah died leaving him surviving, his widow, Rani Bilasmani, and three sons and three daughters. The sons were : Ramendra Narayan Roy, Ramendra Narayan Roy and Rabindra Narayan Roy. Those, mentioned in order of seniority, were known as Bara Kumar, Mejo Kumar and Chhoto Kumar. The daughters were Indumayee, Jyotirmoyee, and Tarinmoyee. Indumayee was the eldest child, Jyotirmoyee the second, then had come the sons, and then the youngest child, Tarinmoyee Debi.

The Rajah had executed before his death a deed of trust and a will, and, though the exact terms of those were not known, their result, as agreed, was that the estate, on his

death, vested in the Rani, his widow, in trust for the three sons. She managed as trustee till her death, which took place on January 21, 1907. On that event the three sons became the owners at law, as they had been in equity; and there was no question that the second Kumar owned a third share in the estate, and would be owning it still, if he were alive, unless he had been prescribed against for the requisite period.

The three Kumars, after the death of their mother, as before, lived as an undivided Hindu family, joint in mess, property and worship. The eldest Kumar was married in 1901 to Sarajubala Debi, the second defendant in this suit. The second Kumar was married in 1902 to Bibhabati Devi, the present appellant, and the third Kumar in 1904 to Ananda Kumari Debi, the fourth defendant in this suit. The family lived at Jaidebpur, and the three sisters, all married, lived as members of the family. Another member of the family was the grandmother, Rani Satyabhama, who had survived her son Rajah Rajendra. The Rajah had a sister, Kripamoyee, who survived him, and who was practically a member of the family, though she lived in a separate block with her husband. The first Kumar died in 1910; the third Kumar died in 1913, and his widow, the fourth defendant, adopted in 1919 a son, Ram Narayan Roy, who was the third defendant. Indumayee and Kripamoyee died in 1920, and Satyabhama died in 1922.

A brief outline of the contentions of the parties was as follows:—there was no dispute that the second Kumar and the appellant, with a large party went from Jaidebpur to Darjeeling in April, 1909, arriving at the latter place on April 20, and took up their residence at a house called “Step Aside,” which had been rented for their stay; and, further, that at that time the second Kumar had gummatous ulcers on or about both elbows and on his legs, being the tertiary stage of syphilis, which he had contracted at some date subsequent to 1905. It was also agreed that he was taken for dead on May 8, 1909. The appellant maintained that the second Kumar died shortly before midnight and that the following morning his body was taken in a funeral procession and was cremated with the usual rites at the new sasan at Darjeeling. The plaintiff admitted that there was a funeral procession and cremation on the morning of May 9, but maintained that the body so cremated was not that of the second Kumar; his case was that the second Kumar was taken for dead about dusk, between seven and eight o'clock, in the

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evening of May 8, that arrangements were at once made for cremation, that the body was taken in funeral procession to the old sasan, and placed in position for cremation, when a violent storm of rain caused the party to take shelter, and that, on their return after the rain had abated, the body was no longer there ; that, thereafter another body was procured and taken to " Step Aside," and was the subject of the procession and cremation the following morning.

On May 10, the appellant, with the rest of the party, left Darjeeling for Jaidebpur, where she had her ordinary residence until April, 1911, when she left for Calcutta, to live there permanently with her mother and brother Satyendra in a rented house. She began to enjoy her widow's estate in the undivided one-third share of the Bhowal estate, which the second Kumar had owned, and she recovered the proceeds, amounting to Rs.30,000, of a life policy taken out by the second Kumar, the necessary certificates of his death having been provided. Soon after her departure for Calcutta, the Court of Wards took charge of the appellant's share of the Bhowal estate, and an attempt by her to obtain its release having been unsuccessful, her share remained in charge of the Court of Wards up to the time of the decree in the present suit.

On the other hand, the plaintiff's case was that while the funeral party were sheltering from the storm, he was found to be still alive by four sanyasis (ascetics), who were nearby and had heard certain sounds from the sasan, and who released him and took him away, looked after him, and took him with them in their wanderings ; that when he had recovered from an unconscious state, he had lost all memory of who he was, where he came from and of past events. He lived and garbed himself as a sanyasi would, smeared himself with ashes and grew long matted hair and a beard. Some eleven years later he recalled that he came from Dacca, but not who or what he was ; that in December, 1920, or January, 1921, he reached Dacca, and took up a position on the Buckland Bund, a public walk on the margin of the river Buriganga, at Dacca, where people promenade, morning and evening, for pleasure or health. He could be found seated at the same spot, day and night, with a burning dhuni (ascetic's fire) before him. Then followed a period of gradual recognition or suspicion of him as the second Kumar by certain people, which culminated in the removal of the ashes, and after greatly increased recognition of him as the second Kumar by relatives and others, a declara-

tion by him of his identity as the second Kumar in the presence of many people on May 4, 1921, and that mainly on the insistence of his sister Jyotirmoyee, who accepted him as such and was one of his principal witnesses.

The argument before the Board was mainly directed to the question whether there were any special circumstances which would justify the Board departing from their well-established practice of refusing to review the evidence again where there were concurrent findings by the courts below on a pure question of fact. The relevant authorities are reviewed in the judgment of the Judicial Committee.

1946. The hearing of the appeal took place on twenty-eight days between May 1 and July 1, both dates inclusive.

W. W. K. Page K.C. and *P. P. Ghose* for the appellant.

Pritt K.C., *U. Sen Gupta*, *Handoo* and *Arabinda Guha* for the first respondent.

July 30. The judgment of their Lordships was delivered by LORD THANKERTON, who stated the facts set out above and continued : It is unnecessary, for the present purpose, to say anything about the very large body of evidence, oral and documentary, as to recognition of the plaintiff as the second Kumar, or as to his identity with the second Kumar, mentally, culturally, or physically. It may be added that both the trial judge and the judges of the High Court had the advantage of a personal inspection of the plaintiff, which would not be available to this Board.

The appellant is at once faced with the concurrent judgments of two courts on a pure question of fact, and the practice of this Board to decline to review the evidence for a third time, unless there are some special circumstances which would justify a departure from the practice. Their Lordships propose to review the decisions of the Board to ascertain the practice as it now stands, as there can be no doubt that the later decisions have somewhat modified the earlier form of the practice, and also in order to discuss the nature of the special circumstances which will justify a departure from the practice.

The earliest case to which reference may be made is *Mudhoo Soodun Sundial v. Suroop Chunder Sirkar Chowdry* (1) : Dr. Lushington, in delivering the judgment of the Board, said (2) " Both the courts below have decided against the validity

(1) (1849) 4 Moo. I. A. 431.

(2) Ibid. 433.

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“ of the instrument ; a fact which, considering the advantages
 “ the judges in India generally possess, of forming a correct
 “ opinion of the probability of the transaction, and in some
 “ cases of the credit due to the witnesses, affords a strong
 “ presumption in favour of the correctness of their decisions,
 “ but does not, and ought not, to relieve this, the court of last
 “ resort, from the duty of examining the whole evidence, and
 “ forming for itself an opinion upon the whole case.” A similar
 statement was made by Lord Kingsdown, who delivered the
 judgment, in *Naragunty Lutchmeedavamah v. Vengama*
Naidoo (1), and by Lord Cairns, in delivering the judgment in
Tareeny Churn Bonnerjee v. Maitland (2), in which he states
 that the courts below were unanimous.

In November, 1886, in the judgment of the Board, consisting
 of Lord Fitzgerald, Lord Herschell and Sir Barnes Peacock, in
Allen v. Quebec Warehouse Company (3), Lord Herschell, who
 delivered the judgment, said (4) “ Their Lordships having
 “ arrived at the conclusion that there has been no error in
 “ point of law, the sole question that remains for determination
 “ is whether the judgment of the court below ought to be
 “ reversed on the ground that the judges have taken an
 “ erroneous view of the facts. Now, it has always been the
 “ view taken by this Committee in advising Her Majesty,
 “ when the question for determination has been whether
 “ the concurrent judgment of the judges who have been
 “ unanimous below should be supported or reversed, that
 “ unless it be shewn with absolute clearness that some blunder
 “ or error is apparent in the way in which the learned judges
 “ below have dealt with the facts, this Committee would not
 “ advise Her Majesty that the judgment should be reversed.
 “ That principal has been laid down in many cases.” After
 a reference to *Naragunty's* case (1) and *Tareeny's* case (2)
 Lord Herschell proceeds, “ Their Lordships entirely adhere
 “ to the views thus expressed, and therefore they do not
 “ consider that the question they have to determine is, what
 “ conclusion they would have arrived at if the matter had for
 “ the first time come before them, but whether it has been
 “ established that the judgments of the courts below were
 “ clearly wrong ” (5). In the cases so far cited, the Board
 examined the evidence, but a month later than the decision in

(1) (1861) 9 Moo. I. A. 66, 87.

(4) Ibid. 104.

(2) (1867) 11 Moo. I. A. 317, 338.

(5) Ibid. 105.

(3) (1886) 12 App. Cas. 101.

Allen's case (1), a Board consisting of Lord Hobhouse, Sir Barnes Peacock and Sir Richard Couch, decided the case of *Thakur Harihar Buksh v. Thakur Uman Parshad* (2). Lord Hobhouse, in delivering the judgment, said "Therefore their Lordships have not considered it proper to go through the mass of oral evidence given in this case, because, if the courts below concur in their conclusion upon such a matter as family custom, their Lordships are very reluctant to disturb the judgment of those courts. If there had been any principle of evidence not properly applied; if there had been written documents referred to on which the appellant could show that the courts below had been led into error, their Lordships might re-examine the case; but in the absence of any such ground they decline to do so" (3).

In 1894, in *Umrao Begam v. Irshad Husain* (4), Lord Hobhouse, who delivered the judgment, said (5) "This is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs. Their Lordships would be specially unwilling in such a case to depart from the general rule, which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower courts. The counsel for the appellant frankly admitted that they laboured under this difficulty, and that they must find some ground of law or of general principle for impugning the decree. To do this, they made some comments on the use made by the courts below of Raza's oral statements; but these comments all resolved themselves into objections to the weight of evidence, and did not affect its admissibility." A similar opinion was expressed in *Kunwar Sanwal Singh v. Rani Satrupa Kunwar* (6). In *Rani Srimati v. Khajendra Narayan Singh* (7) Lord Lindley, in delivering the judgment, said, "The case is unquestionably one of great difficulty, but the appellants have failed to show any miscarriage of justice, or the violation of any principle of law or procedure. Their Lordships, therefore, see no reason for departing from the usual practice of this Board of declining to interfere with two concurrent findings on pure questions of fact."

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(1) 12 App. Cas. 101.

(5) Ibid. 166.

(2) (1886) L. R. 14 I. A. 7.

(6) (1905) L. R. 33 I. A. 53, 54.

(3) L. R. 14 I. A. 16.

(7) (1904) L. R. 31 I. A.

(4) (1894) L. R. 21 I. A. 163.

127, 131.

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That the practice equally applies where there is a dissent in the appellate court is made clear by two cases. In *Atta Kwamin v. Kobina Kufuor* (1) Lord Kinnear, in delivering the judgment, said, " Their Lordships have seen no sufficient reason for disturbing the judgment in this case. It raises some questions of considerable difficulty. But the difficulties are occasioned by the obscurity of the facts ; and the learned judges below, from their familiarity with the customs and sentiment of the natives, have an advantage for dealing with the evidence which is wanting to this Committee. In such a case, it would not be consistent with an approved rule to reverse the concurrent judgments of two courts, unless ' it be shown with absolute clearness,' to use the language of Lord Herschell, ' that some blunder or error is apparent in the way in which the learned judges below have dealt with the facts.' It is true that Lord Herschell's rule applies in terms to those cases only in which the judges have been unanimous ; and one of the judges of the Court of Appeal has dissented in the present case. But this ought not to detract from the weight which is due to the opinion of the majority on the matter of fact, since the dissent is not based on a different view of the evidence, which indeed the learned judge has hardly considered, but upon grounds of law which their Lordships are unable to adopt " (1). And in *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury* (2) Lord Dunedin, delivering the judgment said, " These two learned judges form a majority of the appellate court. That makes a concurrent finding, and it is not vitiated as such because, as here, the other judge in the appellate court does not come to the same conclusion in fact though coming to the same result in law arising from another fact. Of course, to be concurrent findings binding on this Board, the fact or facts found must be such as are necessary for the foundation of the proposition in law to be subsequently applied to them " (3). The concurrent finding there referred to by Lord Dunedin was that the existence of a marriage was disproved. Counsel for the appellant then argued that, assuming he could show a good acknowledgment of legitimacy, that conferred the status of legitimacy and made it irrelevant to enter into any inquiry as to the fact of marriage. On this Lord Dunedin says, " The case might be disposed of by holding,

(1) (1914) A. I. R. (P. C.) 261.

(3) Ibid. 119.

(2) (1921) L. R. 48 I. A. 114.

“ as the majority of the learned judges of the appellate court
 “ did, that there was no proper acknowledgment of legitimacy.
 “ There is not, however, as to this a ‘ concurrent finding,’ for
 “ the learned trial judge thought otherwise, and it would be
 “ necessary to examine the evidence before coming to the above
 “ conclusion ” (1).

A very important statement as to this practice of the Board was made by Lord Dunedin in delivering the judgment in *Robins v. National Trust Company* (2): “ The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed. The judicature which has given greatest occasion for its development has undoubtedly been the judicature of India, but the principle is not in any way limited in its application to Indian legislation or Indian law, be it Hindu or Moslem, as such. Indeed, it is obvious that if such a rule is a good rule to be applied to the findings of the courts in India, there could be no reason for suggesting that the findings of the courts of our great self-governing Dominions should be entitled to less consideration. Their Lordships wish it to be clearly understood that the rule of conduct is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is this Board.” Later, referring to the use of the phrase “ miscarriage of justice ” used in two earlier judgments of the Board, Lord Dunedin says, “ There was a faint attempt made in the present case to argue that what the appellant considered a quite inadequate appreciation and an unjustifiable belittling of a certain witness whom he regarded as all important would amount to a miscarriage of justice. The expression means no such thing. It means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all. There is, however, also another way of preventing the application of the rule. If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case there is no finding at all ” (3). Later Lord Dunedin says (4), “ Much was sought to be made of the unfair way in which the appellant argued the trial judge had

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(1) L. R. 48 I. A. 120.

(3) Ibid. 518.

(2) [1927] A. C. 515, 517.

(4) Ibid. 521.

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“ treated the evidence of a certain Dr. Shurly. Some of the criticisms he made do not particularly recommend themselves to their Lordships, but in the end he came to his result on a consideration of the whole evidence. That the Court of Appeal looked at the evidence in rather a different way matters not, for the rule is a rule as to concurrent findings, and not a rule as to concurrent reasons. Thus in *Ram Anugra Narain Singh v. Chowdhury Hanuman Sahai* (1), the judgment of the Board states: ‘ The rule [as to concurrent findings] is none the less applicable because the courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence.’ ” The fact that the trial judge based his finding on the oral evidence, while the High Court based their similar finding on the documentary evidence, does not take the case out of the rule, as is settled by *Ram Anugra Singh’s* case (1), just cited by Lord Dunedin, and *Bhagwan Singh v. Allahabad Bank* (2).

At the request of their Lordships, Mr. Page, on behalf of the appellant, dealt with the cases in which the special circumstances were held to justify a departure from the practice of the Board, and which their Lordships will now consider. In *Guthrie v. Abool Mozuffer* (3) in which the High Court had merely stated that they saw no reason to differ from the finding of the Zillah judge, and which related to an allegation of duress by the purchaser in obtaining a deed of sale, it was held by the Board that the findings of the Zillah judge were incomplete, as there was no finding as to the payment of the consideration, that the inferences of the Zillah judge from the facts before him could not be justified, and that his judgment treated the judgment of the Cazee as reversed, whereas it was confirmed on appeal. That case was very special, and can have no bearing on the present case. In *Hay v. Gordon* (4) it was held by the Board that, under the provisions of the Statute of Limitations (Act XIV. of 1859) there were not separate judgments, as the decision of the trial judge was not binding until confirmation by the High Court. This case is also of no assistance in the present case.

In *Venkateswara Iyan v. Shekhari Varma* (5) Sir Arthur Hobhouse, who delivered the judgment, said, “ It is true that upon this question there are concurrent decisions of the

(1) (1902) L. R. 30 I. A. 41, 43.

(4) (1872) 18 Suth. W. R. (Cal.)

(2) (1926) L. R. 53 I. A. 268.

480.

(3) (1871) 14 Moo. I. A. 53.

(5) (1881) L. R. 8 I. A. 143, 150.

“ courts below. But though the question may be called in its
 “ result one of fact, its decision turns upon the admissibility
 “ or value of many subordinate facts, and involves the con-
 “ struction of documents and other questions of law.” Their
 Lordships are unable to hold, under the practice as now
 modified, that the question of the value of evidence, as apart
 from its admissibility, can constitute a reason for departure
 from the practice. In *Thakur Harihar Buksh v. Thakur*
Uman Parshad (1), Lord Hobhouse, whose judgment as to the
 alleged family custom has already been cited, proceeds (2)
 “ Then the question comes back to the construction of the
 “ razinamah, and that is again divided into two branches.
 “ The courts below have found that the razinamah ought to
 “ be construed to give an absolute interest, because it has been
 “ decided that it should be so construed—in fact that the
 “ matter is *res judicata*. Upon that point it is unnecessary
 “ for their Lordships to pronounce any opinion; but they
 “ wish it to be understood that they do not express any agree-
 “ ment with the court below on this point, and it must be
 “ taken that, not having heard the argument on the other side,
 “ their minds are completely open upon it. They rest their
 “ opinion upon the terms of the razinamah itself.” Their
 Lordships then said that the razinamah did confer an absolute
 interest, and they agreed with the decision of the courts below,
 though not for the same reasons. This was a question of law,
 which was essential to the decision.

In *Chitpal Singh v. Bhairon Bakhsh Singh* (3) Lord
 Macnaghten, who delivered the judgment, said, “ It was
 “ urged that the court had drawn a wrong inference from
 “ documents before it, and that this error had led to a mis-
 “ carriage of justice. After all, however, it turns out that the
 “ case is an ordinary case of the concurrence of two judgments
 “ on a mere question of fact, involving many considerations, on
 “ some of which the two courts are not agreed. But the
 “ mere fact that the two courts do not agree on all the steps
 “ which lead to one and the same conclusion is no reason for
 “ disregarding the well-known rule. The rule, however, is
 “ not an absolute rule; it presses upon the appellant with
 “ more or less weight, according to the circumstances of the
 “ case, and no doubt the fact that the courts have differed
 “ on some important but subordinate questions is a matter to

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(1) L. R. 14 I. A. 7.

(2) Ibid. 16.

(3) (1905) I. L. R. 28 A. 219,
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"be taken into consideration in determining whether the evidence before the lower courts should be reviewed in detail." Their Lordships are of opinion that, under the practice as subsequently modified, the latter part of that statement—as a general statement—is too wide. *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi* (1) was a case of no evidence, and a decision that there is no evidence to support a finding is a decision of law. *Chaudhri Satgur Prashad v. Kishore Lal* (2) was a case of legal inference from documents and not of finding of fact. In *Tilakdhari Singh v. Kesho Prasad Singh* (3) it was held that, though the concurrent findings proceeded on the examination of titles and facts, the rule applied. Lord Shaw, who delivered the judgment, said (4), "There is no ground for the suggestion that the judges of the courts below failed in this duty or introduced illegitimate considerations into their view upon the titles and the facts. They having done that which was strictly their duty, their Lordships are of opinion that what remained was a question of fact." The appeal was dismissed on the ground of incompetency, a ground which is not in accordance with the usual procedure of the Board, which simply dismisses the appeal.

In *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills, Ltd.* (5) Lord Dunedin, who delivered the judgment, said, "The present appeal is brought by special leave. Their Lordships think it necessary to say that it must have been conveyed to their Lordships who granted the leave, that the case raised an important and general question. Speaking generally a patent case has to do with the construction and the infringement of one or more particular patents, and it cannot often be said that any general question is thereby raised. In such cases where there have been concurrent judgments of the judge of first instance and the Court of Appeal, their Lordships would deprecate the idea that leave should be given to appeal to the King in Council." The practice in regard to patent cases, which is more fully explained in the ensuing part of the judgment, allows a departure from the practice, where the trial judge, being judge both of fact and law, has misdirected himself in law, and patent cases thus are subject to the general practice.

(1) (1914) L. R. 41 I. A. 110.

(4) Ibid. 124.

(2) (1919) L. R. 46 I. A. 197.

(5) (1929) A. I. R. (P. C.) 38, 39.

(3) (1925) A. I. R. (P. C.) 122.

From this review of the decisions of the Board, their Lordships are of opinion that the following propositions may be derived as to the present practice of the Board and the nature of the special circumstances which will justify a departure from the practice :—

(1.) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.

(2.) That it applies to the concurrent findings of fact of two courts, and not to concurrent findings of the judges who compose such courts. Therefore a dissent by a member of the appellate court does not obviate the practice.

(3.) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.

(4.) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand ; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

(5) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6.) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7.) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country.

(8.) That the practice relates to the findings of the courts

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below, which are generally stated in the order of the court, but may be stated as findings on the issues before the court in the judgments, provided that they are directly related to the final decision of the court.

In this appeal the concurrent finding of fact is as follows :

“ It is declared that the plaintiff is the Kumar Ramendra “ Narayan Roy, the second son of the late Rajah Rajendra “ Narayan Roy, Zemindar of Bhowal.” It was for the plaintiff to prove that he is the second Kumar, and, in order to do so, he had to survive various tests, any one of which, if he failed to surmount it, would almost inevitably destroy his whole case. In these circumstances, in the opinion of their Lordships, the appellant was entitled to maintain, as regards any one of such tests, that there were such special reasons as would justify a departure from the practice of the Board. Perhaps the most striking of these tests was whether the second Kumar in fact died at Darjeeling or survived. If he did die there, that fact would completely negative the plaintiff’s case. The seventh proposition above stated is applicable to the circumstances of the present case. With these preliminary observations, their Lordships, will proceed to consider the contentions submitted by Mr. Page on behalf of the appellant. A number of these contentions related to subordinate matters of evidence, or that the trial judge had not sufficiently taken into account particular oral or documentary evidence, or that the judges who formed the majority in the High Court had not formed their own conclusions on the evidence. These subordinate matters of evidence, even if they might be called important, do not afford any sufficient reason for departure in this case from the practice as above explained by their Lordships, and their Lordships are clearly of opinion that the criticisms of the trial judge and the judges of the High Court are quite unjustified. Further, their Lordships are unable to find any defect in these judgments in considering the separate compartments into which the evidence conveniently falls, and carefully considering the inter-relation of such compartments and their reaction on each other. There remain three contentions with which their Lordships find it necessary to deal.

The first of these contentions relates to the admissibility of the evidence of four witnesses, conveniently referred to as the Maitra group, whom the learned trial judge accepted as unimpeachable witnesses, and whose evidence he accepted as virtually conclusive proof of the time of “ death ” as having taken place at dusk, between seven and eight o’clock. The

time of death or apparent death at Darjeeling is crucial. If the death took place shortly before midnight, and not at dusk, that fact would be fatal to the plaintiff's case. The learned judges of the majority in the High Court placed the same reliance on this evidence. The evidence of these four witnesses is described with sufficient accuracy by the trial judge as follows :—" The evidence of these gentlemen is that one day " they were seated in the common room of the (Lewis Jubilee) " Sanitarium before dinner—that would be about 8 p.m.— " chatting, each does not recollect all the rest, but each recol- " lects the day, and the fact they used to be in the common " room before dinner. They recollect the day, not the date or " anything, but the day when a certain thing happened. " When they were so seated, and there were others too, a man " came with the news that the Kumar of Bhowal was just dead, " and he made a request for men to help to carry the body for " cremation. Principal Maitra has a distinct recollection of " this request—the news broke in upon the talk they were " having, and the thing has stuck in his memory." It should be added that the man who so came into the common room has not been identified, and is not a witness. It was, further, agreed that, according to the Hindu custom cremation would, when possible, follow immediately after the death.

Their Lordships are of opinion that the statement and request made by this man was a fact within the meaning of ss. 3 and 59 of the Indian Evidence Act of 1872, and that it is proved by the direct evidence of witnesses who heard it, within the meaning of s. 60 ; but it was not a relevant fact unless the learned judge was entitled to make it a relevant fact by a presumption under the terms of s. 114. As regards the statement that the Kumar had just died, such a statement by itself would not justify any such presumption, as it might rest on mere rumour, but, in the opinion of their Lordships, the learned judge was entitled to hold, in relation to the fact of the request for help to carry the body for cremation, that it was likely that the request was authorized by those in charge at " Step Aside," having regard to " the common course of " natural events, human conduct and public and private " business," and therefore to presume the existence of such authority. Having made such presumption, the fact of such an authorized request thereby became a relevant fact, and the evidence of the Maitra group became admissible. Accordingly, this contention fails.

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The remaining two contentions relate to the question of identity, the colour of the eyes and the indications of syphilis. It is agreed that the eyes of the second Kumar and the plaintiff are Kata eyes, that is, of a shade lighter than the normal dark brown eyes of a Bengalee; it is also common ground that the eyes of the plaintiff are of a light brownish colour. The dispute is as to the colour of the eyes of the second Kumar. Mr. Page's contention rested on the view that the entry of their colour as "grey" in Dr. Caddy's report to the insurance company in 1905 in connexion with the proposal of the second Kumar for life insurance could only mean that they were grey as distinguished from brown, and that the report must be accepted as conclusive of the matter. But this contention must fail, for not only was there conflicting evidence on the point, having regard to the statement in the affidavit dated March 6, 1910, given to the insurance company by Kali Prasanna Vidyasagar, who had long been familiar with the second Kumar, and therein stated that the latter's eyes were rather brownish, but the witness Girish Chandra Sen stated that Dr. Caddy had asked him to look for any identification marks, and that he told the doctor "grey eyes," thereby meaning Kata eyes. It follows that it was a question of value of evidence, and the learned judge had before him evidence on which he was entitled to hold that the eyes of the second Kumar were brownish, and therefore similar to the eyes of the plaintiff.

It is common ground that, when the second Kumar went to Darjeeling he had gummatous ulcers on both arms about the elbows, and about both legs, representing the tertiary stage of syphilis, which he had contracted on some date subsequent to Dr. Caddy's examination of him in 1905. Further, it is not disputed that there was evidence on which the learned judge was entitled to find that the plaintiff is "an old syphilitic individual." It is enough to say that the plaintiff has one scar on the left arm and two on the right arm, in each case about the elbow; these clearly, on the evidence, are a small proportion of the number of ulcers from which the second Kumar was suffering in 1909, but there was evidence on which the learned judge was entitled to hold that these three scars were the remains of some of the second Kumar's ulcers. There was no definite evidence as to the permanency, or otherwise, of scars left by gummatous ulcers. There does not seem to have been any evidence which would enable the learned judge

to identify any scars on the legs of the plaintiff as corresponding in position with the position of the second Kumar's ulcers on his legs. Mr. Page sought to found on a passage in the evidence of the plaintiff's witness, Dr. K. K. Chatterji, in which he says, "If the ulcers of 1909, big ulcers on both arms and legs, are not treated or dressed or washed, I would give three months to him. He would get septic and die. Even if he is washed with water, but not antiseptic, it will make no difference. If washed with antiseptics but no dressing or treatment, his chance of life would increase five per cent. roughly speaking. If washed, but not with antiseptic and covered up with cloth and not surgical dressing, the chance would be less." The plaintiff stated in his evidence that while with the Sanyasis, he had no treatment. But the doctor's evidence is a calculation of chances of recovery, which no doctor would maintain to be without exception, and it is not surprising that he later states that there is no normality in syphilis. The whole matter is one of the value of evidence, and this contention also fails.

Accordingly, their Lordships are of opinion that the appellant has failed to establish any valid ground for departure from the practice of the Board.

Finally, the appellant rests on art. 144 and s. 28 of the Indian Limitation Act of 1908. On the supposed death of the second Kumar the appellant entered on her widow's estate in the undivided one-third share of the Bhowal estate, which belonged to her husband, and she thereafter enjoyed it—after 1911, through the Court of Wards—for a period much exceeding the necessary twelve years, and the question is whether her possession was adverse to her husband, he being in fact alive. Possession must be adverse to a living person, and, as she was possessing under a mistake as to his death, it is difficult to see how she can claim that by her possession she was asserting a right adverse to one whom she regarded as dead. The position of a widow as regards limitation is stated in *Lajwanti v. Safa Chand* (1), where Lord Dunedin, delivering the judgment, said, "It was then argued that the widows could only possess for themselves; that the last widow Devi would then acquire a personal title; and that the respondents and not the plaintiffs were the heirs of Devi. This is quite to misunderstand the nature of the widow's possession. The Hindu widow, as often pointed out, is not a life renter, but has a widow's

(1) (1924) L. R., 51 I. A. 171, 176.

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“estate—that is to say, a widow’s estate in her deceased husband’s estate. If possessing as widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as stridhan, but she makes them good to her husband’s estate.” Mr. Page, for the appellant, conceded that the appellant’s possession could not be adverse to the reversioners, who would take as heirs of her husband, on the termination of her widow’s estate. All that the appellant claimed to have prescribed was her interest in the estate as widow of the second Kumar. It might well be argued that, according to the Hindu law, the wife is half of the husband, and that, on his death, she holds his estate as one-half of the husband, but their Lordships prefer to base their rejection of the appellant’s contention on the broader ground that her possession was not adverse to a husband, whom she regarded as dead.

Their Lordships cannot part with this case without expressing their deep indebtedness to counsel for their valuable assistance in a case of such unusual magnitude and complication, and, in particular, their gratitude and admiration for the untiring skill and breadth of mind with which Mr. Page has conducted his case.

Their Lordships, accordingly, are of opinion that the appeal fails and should be dismissed, and that the decision of the High Court should be affirmed, and they will so advise His Majesty. In the very special circumstances of this case, there will be no order as to costs of the appeal.

Solicitors for appellant : *Sanderson, Lee & Co.*

Solicitors for first respondent : *T. L. Wilson & Co.*

[PRIVY COUNCIL]

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BRITISH COLUMBIA ELECTRIC
RAILWAY COMPANY, LIMITED . APPELLANT ;
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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Revenue—Tax on dividends received by non-residents from Canadian debtors—Extra-territorial operation—Constitutional validity—“Residence” as test of “Canadian” debtor—Income War Tax Act, R. S. C. 1927, c. 97, as added by c. 41 of S. C. 1932-33, s. 9B, sub-s. 2 (a)—British North America Act, 1867 (30 & 31 Vict., c. 3), s. 91 (3.)—Statute of Westminster, 1931 (22 Geo. 5, c. 4), s. 3.

By s. 9B, sub-s. 2 (a), which was added to the Income War Tax Act, R. S. C. 1927, c. 97, by c. 41 of the S. C., 1932-33, it was provided that : “In addition to any other tax imposed by this Act “an income tax of five per centum is hereby imposed on all persons “who are non-residents of Canada in respect of (a) all dividends “received from Canadian debtors irrespective of the currency in “which the payment is made.”

The effect of s. 3 of the Statute of Westminster, 1931, which provides that “the Parliament of a Dominion has full power to “make laws having extra-territorial operation,” on head 3 of s. 91 of the British North America Act, 1867, under which the Dominion Parliament may make laws in respect to “the raising of money by “any mode or system of taxation,” is to add to head 3 of s. 91 the words “even though such laws have an extra-territorial operation.” Section 9B, sub-s. 2 (a), of the Income War Tax Act, imposing a tax on non-residents, was accordingly intra vires the Dominion legislature.

The test to be applied in deciding who is a “Canadian debtor” within the meaning of s. 9B, sub-s. 2 (a), of the Income War Tax Act is not the test of nationality in an individual or of registration in a company, but the test of residence, and the appellant company, which was incorporated in the United Kingdom, with its registered office in England, was resident in Canada in the sense in which “residence” is attributed to an incorporated company for income tax purposes, where its whole business was in substance controlled, managed, conducted and carried on in Canada. The appellant company was accordingly a “Canadian debtor” within the meaning of s. 9B, sub-s. 2 (a), of the Act in respect of dividends paid to non-resident shareholders, and was liable in proceedings taken by

* *Present* : VISCOUNT SIMON, LORD WRIGHT, LORD PORTER, LORD UTHWATT and SIR LYMAN DUFF.

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the Crown to recover the amount of tax not withheld^a as required by the Act from dividends paid to such shareholders.

Section 84 of the Income War Tax Act, which imposes a penalty on any person who fails to collect or withhold any sum as required by the Act, is absolute in its terms and cannot be read with the qualification that the receipt referred to in s. 87 of the Act must give effective protection to the company in every case.

Judgment of the Supreme Court of Canada affirmed.

APPEAL (No. 45 of 1946), by special leave, from a judgment of the Supreme Court of Canada (February 11, 1946), which reversed a judgment of the Exchequer Court of Canada (May 25, 1945).

The action out of which this appeal arose was brought by the respondent, on the information of the Attorney-General for Canada, to recover the amount of tax and interest thereon which it was alleged that the appellant company should have withheld from dividends paid to such holders of its five per cent. cumulative perpetual preference stock as were non-residents of Canada during the period between April 1, 1933, and April 29, 1941. The appellant company was incorporated in the United Kingdom; its registered office was in England, where the register of members holding substantially all the five per cent. cumulative preference stock was kept. There was also a Dominion register in Canada for members registered in Canada. The business of the company was carried on in British Columbia, where it operated electric railways, and also manufactured and sold heat, light and power. The shareholders' and directors' meetings were held in Canada, and the dividends were declared there.

The questions in the appeal were (a) whether the appellant company was a "Canadian debtor" within the meaning of s. 9B, sub-s. 2 (a), of the Income War Tax Act of Canada, and (b) whether s. 9B, sub-s. 2 (a) was a valid exercise of the legislative powers of the Dominion Parliament.

Section 9B of the Income War Tax Act, R. S. C. 1927, c. 97, as added by c. 41 of S. C. 1932-33, and as at April, 29, 1941, provided that:—"9B.—(1.) In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons resident in Canada, except municipal-ities, or municipal or public bodies which in the opinion of the Minister perform a function of government, in respect of all interest and dividends paid by Canadian debtors, directly or indirectly to such persons, which interest by the terms of

" the mortgage deed, hypothec or other instrument under which the debt was contracted or which dividends by the terms of issue, are payable in a currency which is at a premium in excess of five per centum in terms of Canadian funds.

" (2.) In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons who are non-residents of Canada in respect of

" (a) All dividends received from Canadian debtors irrespective of the currency in which the payment is made, and

" (b) All interest received from or credited by Canadian debtors, if payable solely in Canadian funds except the interest from all bonds of or guaranteed by the Dominion of Canada.

" (4.) In the case of interest or dividends in respect of fully registered shares, bonds, debentures, mortgages or any other obligations, the taxes imposed by this section shall be collected by the debtor who shall withhold five per centum of the interest or dividend on the obligation and remit the same to the Receiver-General of Canada.

" (9.) Every agreement for payment of interest or dividends in full without allowing any such deduction or withholding shall be void."

By s. 84.—"(1.) Any person who fails to collect or withhold any sum of money as required by this Act or regulations made thereunder, shall be liable for the amount which should have been collected or withheld together with interest at the rate of ten per centum per annum.

" (2.) Any person who fails to remit any sum of money collected or withheld as required by this Act, or at such time as the Minister may in special cases prescribe, shall in addition to being liable for such sum of money so collected or withheld, be liable to a penalty of ten per centum of the said sum together with interest at the rate of ten per centum per annum."

By s. 86.—"No action shall lie against any person for withholding or deducting any sum of money as required by this Act or regulations made thereunder."

By s. 87.—"The receipt of the Minister for any sum of

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“ money collected, withheld or deducted by any person as
“ required by this Act or regulations made thereunder shall
“ constitute a good and sufficient discharge of the liability of
“ any debtor to his creditor with respect thereto to the extent
“ of the amount referred to in the receipt.”

The Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand and Kellock J.J.), reversing the judgment of the President of the Exchequer Court (Thorson J.), held that the Income War Tax Act, s. 9B, sub-s. 2, was *intra vires* the Parliament of Canada, that the appellant company was a “ Canadian “ debtor ” within the meaning of the section, and that the action succeeded.

1946. July 4, 8, 9, 10. *Hon. J. W. Farris K.C.* and *A. Bruce Robertson* (both of the Canadian Bar) for the appellant company. Sections 86 and 87 of the Income War Tax Act appear to be the keystone of the arch. The Act, as amended, sets up a definite scheme for collecting taxes at source ; the tax is imposed under s. 9B, sub-s. 2 (a), solely on the non-residents—not on the company—and the company is the compulsory tax collector on behalf of the Government. It is by s. 86 and, particularly, s. 87, that the Government seeks to reach the property of the non-resident shareholder through the Canadian debtor, and it is only to the extent that these sections are effectively operative that the machinery for collecting the tax can succeed. In other words, it is only when a receipt given under s. 87 constitutes a good and sufficient discharge that this plan of collecting through the company at the source is effective and operative. Section 9B, sub-ss. 2, 4, 8 and 9, and ss. 84, 86 and 87 are all tied together, and are all machinery for this one purpose of collecting at source. The contract made between the company and its shareholders is an English contract, made in England ; the moneys are to be paid in England, the situs of the shares is there, as also is the registered transfer office of these shares. This Act purports to tax a non-resident in relation to an asset which he owns in England, and there is neither property nor individual subject to the tax available in Canada on which the tax can be imposed in this particular case. The proper law of the obligation is English, and there is no power in the Canadian Parliament to give a valid receipt under s. 87 ; the provisions of the Canadian Act would afford the appellant no protection in an action brought in the English courts to recover any part of the dividends which might

have been withheld. If there cannot be a valid discharge under s. 87 the company is not collecting at all, it is paying out of its own pocket. The position in *Trinidad Lake Asphalt Operating Co., Ltd. v. Commissioners of Income Tax for Trinidad and Tobago* (1) is the exact opposite of that in this case.

The appellant is not a "Canadian debtor" within the meaning of sub-s. 2 (a) of s. 9B of the Act. The word "Canadian" in the phrase "Canadian debtor" cannot mean a debtor company carrying on its business in Canada or a debtor "resident in Canada" because that is in no sense the natural meaning of the word. One of the essentials of a "Canadian debtor" is that he owes a debt which itself is Canadian according to the law of Canada. It is a reasonable interpretation that the debt colours the meaning of debtor. There are many factors which go to making up a Canadian debtor, but the important thing here is the debt; that must govern the effectiveness or non-effectiveness of s. 87, and therefore it is submitted that it is within the very essence of "Canadian debtor" here to say that the kind of debt the person owes gives the correct colour to what he himself is. He is not a Canadian debtor within the meaning of s. 9B, sub-s. 2 (a), unless it is a Canadian debt. If "Canadian debtor" means no more than a debtor resident in Canada, then the Parliament of Canada has made a law purporting to alter contractual obligations which are not necessarily subject to Canadian law at all. In the circumstances of this case where, inter alia, the company is registered in England, the proper law of the obligation is English. [Reference was made to *Spiller v. Turner* (2), *Martin v. Nadel* (3), *Swiss Bank Corporation v. Boehmische Industrial Bank* (4), *New Zealand Loan and Mercantile Agency Co. v. Morrison* (5), *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.* (6), and *London and South American Investment Trust v. British Tobacco Co. (Australia)* (7), where *Brassard v. Smith* (8) is referred to.] The test of a "Canadian debtor" is whether he owes a debt the proper law of which is Canadian, and the proper law of the appellant's debt in respect of declared dividends being English, the appellant cannot be said to be a "Canadian debtor."

It is further contended that if the appellant company is a

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(1) [1945] A. C. 1.

(2) [1897] 1 Ch. 911, 918.

(3) [1906] 2 K. B. 26.

(4) [1923] 1 K. B. 673, 678-9.

(5) [1898] A. C. 349, 355, 359.

(6) [1920] 1 K. B. 539.

(7) [1927] 1 Ch. 107, 117-8, 119.

(8) [1925] A. C. 371.

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"Canadian debtor" within the meaning of s. 9B, sub-s. 2 (a), then that section is ultra vires. The provisions of s. 9B, sub-s. 2, purport to tax a non-resident in respect of property out of the jurisdiction. The extra-territorial power given to the Parliament of Canada under the Statute of Westminster is limited to the extension of existing powers; s. 3 of the Statute of Westminster has not had the effect of conferring on the Dominion an independent power to legislate extra-territorially, but has merely abrogated certain limitations and disabling restrictions which previously existed on the Dominion's powers of legislation. There still exist the assigned limits of subject and area: *British Coal Corporation v. The King* (1). The Statute of Westminster has not given Canada power to originate legislation which it had no power to deal with before. The power to tax a non-resident in regard to extraneous property never was within the jurisdiction of the Canadian Parliament, and a power that Canada never had cannot be extended.

A. Bruce Robertson followed. The meaning we give to "Canadian debtor" in s. 9B, sub-s. 2, is entirely in accord with the language used in Buckley on The Companies Acts, 11th ed., p. 317. The fact that there never was actually in Canada any money belonging to the shareholder is another indication that the debt is an English debt. [Reference was made to *New Zealand Loan and Mercantile Agency Co. v. Morrison* (2), *Wallace v. Attorney-General* (3), *Harding v. Commissioner of Stamps for Queensland* (4), *Provincial Treasurer of Alberta v. Kerr* (5) and *Forbes v. Attorney-General for Manitoba* (6).] Every attempt is made to see that it is the shareholder, and not the company, who bears the tax: s. 9B, sub-s. 9; s. 87. With regard to the submission that s. 9B, sub-s. 2 (a), is ultra vires, two tests should be applied to determine whether or not any extra-territorial legislation is good, and both must be satisfied for it to be good. The first is, is the legislation within the accepted rules of international law? The second test is, is the legislation within the limits assigned by the British North America Act, 1867? The tax here is on stockholders who neither reside in, nor owe allegiance to, Canada; the situs of the debt, which is the property in respect of which the tax is imposed, is in England; and for those reasons the section imposing the tax is extra-territorial

(1) [1935] A. C. 500.

(4) [1898] A. C. 769, 773.

(2) [1898] A. C. 349, 355.

(5) [1933] A. C. 710, 720.

(3) (1865) L. R. 1 Ch. 1, 9.

(6) [1937] A. C. 260, 265, 269.

legislation : *Blackwood v. The Queen* (1) ; *Commercial Cable Co. v. Attorney-General for Newfoundland* (2) ; *London and South American Investment Trust v. British Tobacco Co. (Australia)* (3) ; *Trinidad Lake Asphalt Operating Co., Ltd. v. Commissioners of Income Tax for Trinidad and Tobago* (4) and *Provincial Treasurer of Alberta v. Kerr* (5). In testing the validity of extra-territorial legislation since the Statute of Westminster the two tests already mentioned must be applied : only such legislation as is competent as a matter of international law is authorized by s. 3 of the Statute of Westminster : s. 3 was not intended to confer any futile power ; it was merely intended to abrogate the restrictions on power which already existed. A law which has extra-territorial operation can only operate extra-territorially in other jurisdictions if the power of the enacting State is recognized in the other jurisdiction as existing. The Dominion has full power to make laws, but that does not mean unlimited power, but power up to the capacity of the Dominion to exercise effectively. A statute cannot operate unless it is effective. For extra-territorial legislation to be recognized as valid it must be good in private international law. With regard to the second test, it is submitted that any law made by the Dominion Parliament must still be for the peace, order and good government of Canada : *British North America Act, 1867, s. 91*. The points in support of this argument to be derived from *British Coal Corporation v. The King* (6) are : (a) The extent of the Dominion's legislative competence must still be ascertained by the *British North America Act*, and certain limitations still flow from it. (b) The Dominion has supreme power only within the limits of subject and area assigned to it by the *Constitution Act*. (c) The effect of the *Statute of Westminster* is said to have been to abrogate certain limitations, not to grant any new powers. (d) The prerogative appeal which the Dominion was held competent to limit is simply one element in the general system of appeals in the Dominion. (e) The right of self government and nothing more was stressed, and (f) if s. 3 confers an independent power of legislation and there is no limitation on it, the Board were, with respect, wasting their breath in pronouncing as they did : all they need have said was, this is extra-territorial legislation and so it is *intra vires*. [Reference was also made to *Nadan v.*

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(1) (1882) 8 App. Cas. 82, 95.

(2) [1912] A. C. 820, 826.

(3) [1927] 1 Ch. 107, 114.

(4) [1945] A. C. 1, 7.

(5) [1933] A. C. 710, 717-8.

(6) [1935] A. C. 500.

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The King (1), *Croft v. Dunphy* (2) and *Attorney-General for Ontario v. Attorney-General for Canada* (3).] A law imposing taxation on persons outside Canada in respect of property outside is not a law for the peace, order and good government of Canada—it is making a law for people in places outside Canada. Section 9B, sub-s. 2 (a), and s. 9B, sub-s. 9, and s. 87 are all part of one scheme and must stand or fall together.

Pritt K.C., Gahan and W. R. Jackett (of the Canadian Bar) for the respondent. There are nine propositions to support the submission that the appellant company is a “Canadian debtor”: Firstly, the proper law of this debt is Canadian law. Canada is a sovereign State, and since the Statute of Westminster is as fully entitled to legislate as Great Britain or France: *Croft v. Dunphy* (2). The subject-matter here is debt, not contract. This particular debt is one to which the law of Canada, and not the law of England, applies; it is a debt which comes into existence in Canada, and cannot come into existence anywhere else. The appellant’s head office is in Canada; all its general meetings must be held there, as well as all meetings of the board of directors; only residents of Canada can be directors, and the company’s officers must reside there; the appellant’s seal is, and must be kept, in Canada, and its whole business is in substance controlled, managed, conducted and carried on in Canada. The whole of the dividends is also earned in Canada. The company is admittedly resident in Canada and nowhere else. In the light of those facts the assertion for the appellant that nothing that was sought to be taxed was in Canada—neither property nor individual—is subject to some modification. The second proposition is that this debt is situated in Canada. The place where the debt is to be paid is an important consideration, and the proper inference from the law is that the situs of the debt is where the debtor resides: Dicey’s *Conflict of Laws*, 4th ed., p. 344 et seq. [Reference was made to *Raleigh Investment Co., Ltd. v. Governor-General in Council* (4) and *Evling v. Israel & Oppenheimer, Ltd.* (5).] The proper law of these debts, when the shareholder is resident in Canada, must be the law of Canada, and when there is a bunch of contracts the court should say that all those contracts should be subject to the same law: *Lloyd v.*

(1) [1926] A. C. 482.

(2) [1933] A. C. 156.

(3) [1912] A. C. 571, 583-4.

(4) [1944] F. C. R. 229.

(5) [1918] 1 Ch. 101.

Guibert (1). Thirdly, the appellant is also a Canadian debtor because the company is resident in Canada ; fourthly, because the Dominion Parliament has power over this debt ; fifthly, because s. 9B, sub-s. 2 (a), can be effectively operated to impose and collect this tax ; sixthly, s. 84 is valid and effective—that is the section which imposes a penalty for failure to collect. The seventh proposition is that s. 9B, sub-s. 2, as a matter of construction, can be, and should be, applied independently of s. 87 ; it can be applied irrespective of whether or not s. 87 gives the relief it is intended to give in a particular case. There is nothing in the words of the section, which ought to be read in their ordinary form, against that submission, and secondly, since it was said that in order to avoid injustice s. 87 should be read to link up with s. 9B, sub-s. 2, there are various sections in the Act where there are similar provisions and where any attempt to link up s. 87 with those is defeated by the plain provision of the words : s. 19, sub-s. 2 ; s. 25, sub-s. 2 ; s. 27, sub-ss. 2, 4, 5 ; s. 72, sub-s. 2 ; s. 91, sub-ss. 5, 6, 11, 16 and 17. The eighth proposition is that in a case like this an English court in an English action will recognize the validity of the discharge—assuming that it is governed by English law : *Ralli Brothers v. Compania Naviera Sota Y Aznar* (2) ; Dicey's Conflict of Laws, 4th ed., p. 618, r. 160. Assuming that English law is the law of the debt or the contract, then if part of the contract has to be performed in a foreign jurisdiction the English courts will say that if something is prohibited by the law of that jurisdiction then in applying the English law we will recognize the difficulties and laws of the foreign jurisdiction. The English courts would recognize a s. 87 discharge because English courts will see that the Canadian tax collector does get effective jurisdiction over the debt, because the debt is created and situated in Canada. The English courts will recognize a penal restriction imposed by the law of another country. [Reference was made to Dicey's Conflict of Laws, 5th ed., p. 657, exception 3 ; pp. 658, 671, r. 161, sub-r. 3 ; p. 673, and to *Vita Food Products, Inc. v. Unus Shipping Co.* (3) ; Buckley on The Companies Acts, 11th ed., p. 317 ; *Spiller v. Turner* (4) ; *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.* (5) ; *London and South American Investment Trust v. British Tobacco Co. (Australia)* (6) ; *Delage*

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(1) (1865) L. R. 1 Q. B. 115,
119, 122, 127.

(2) [1920] 2 K. B. 287.

(3) [1939] A. C. 277, 291.

(4) [1897] 1 Ch. 911, 912, 919.

(5) [1920] 1 K. B. 539, 548.

(6) [1927] 1 Ch. 107.

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v. *Nugget Polish Co., Ltd.* (1); *Trinidad Lake Asphalt Operating Co., Ltd.* v. *Commissioners of Income Tax for Trinidad and Tobago* (2), and the authorities cited on behalf of the appellant.] The ninth and last proposition is that the validity of this Canadian discharge in a Canadian court could not be allowed to depend on what foreign courts may do in their own courts. The appellant is a Canadian debtor within the meaning of s. 9B, sub-s. 2 (a), of the Income War Tax Act.

[He was not required to deal with the question whether the section was *intra vires*.]

J. W. Farris K.C., replied. The law of this contract is governed by English, not Canadian, law. As to the suggested distinction between the debt and the contract, it is difficult to separate them so as to make the contract in England and the debt in Canada. The respondent says that the situs of the debt is the residence of the debtor, but an entirely different rule applies here and different authorities govern the case, for what has to be established is whether or not the Canadian Parliament can modify the English obligation: *Dicey's Conflict of Laws*, 5th ed., p. 337, r. 76; *Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* (3). It is the law of the contract which creates the obligation that must govern whether or not the plaintiff in an action on his debt is to recover the whole of his debt, and the Parliament of a foreign country cannot modify the terms or conditions of that contract: *Jacobs, Marcus & Co. v. Credit Lyonnais* (4).

July 31. The judgment of their Lordships was delivered by VISCOUNT SIMON. This is an appeal, by special leave, from a judgment of the Supreme Court of Canada, dated February 11, 1946, which allowed the appeal of the present respondent from a judgment of the Exchequer Court of Canada, dated May 25, 1945. The action was brought by the present respondent to recover the amount of a tax, and interest thereon, which it was alleged that the present appellant should have withheld from dividends paid to such holders of its five per cent. cumulative perpetual preference stock as were non-residents of Canada during the period between April 1, 1933, and April 29, 1941. The Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand and Kellock J.J.), reversing

(1) (1905) 92 L. T. 682, 685.

(2) [1945] A. C. 1, 6-8.

(3) (1890) 25 Q. B. D. 399, 405.

(4) (1884) 12 Q. B. D. 589,

595, 600.

the judgment of the President, held that the action, which took the form of an Information of the Attorney-General for Canada filed on April 1, 1943, succeeded.

[His Lordship set out the sections of the Income War Tax Act, on which the controversy turns, namely, s. 9B, sub-ss. 1, 2, 4, 9, and ss. 84, 86 and 87, and continued:] Thus, by s. 9B, sub-s. 2 (a), it is provided that non-residents of Canada are taxed in respect of all dividends received from Canadian debtors, and by s. 9B, sub-s. 4, the tax is to be collected by the Canadian debtor, who is to withhold five per cent. of the dividend and remit the same to the Receiver-General of Canada. The appellant failed to do this, and the Attorney-General for Canada claims that it is accordingly liable under s. 84, sub-s. 1, for the amount, with interest at the rate of ten per cent. per annum on it. The appellant company resists this claim, contending that it is not a "Canadian debtor" within the meaning of the section above quoted, and secondly, that if it is a "Canadian debtor" within the meaning of these sections, the legislation is ultra vires the Parliament of Canada, notwithstanding the Statute of Westminster of 1931.

On the first question the Exchequer Court took the view that a "Canadian debtor" meant a debtor of Canadian nationality and, as applied to a company (which is plainly included by reason of the reference to dividends) meant a company registered under Canadian law. It is not, perhaps, entirely clear from the President's judgment whether he would regard a company incorporated under the law of a Canadian province as a "Canadian debtor" in respect of its dividends or whether he would apply the term only to companies registered under Dominion law, but the material point is that he considered the test to decide who was a "Canadian debtor" in the case of an individual depended on the individual's nationality and not on his place of residence, and therefore logically held that in the case of an incorporated company the test was the place of the incorporation of the company and not its place of "residence" as understood in the law relating to companies, i.e., the place where the company had its "head and seat."

In the present case there could be no doubt at all that the "residence" of the appellant company was Canadian. The company was incorporated in the United Kingdom and had its registered office in England. It was registered in British Columbia as an extra-provincial company under the Companies' Act, 1897, of British Columbia. Under the Companies' Act,

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1929, of the United Kingdom (19 & 20 Geo. V., c. 23) its register of members was kept at its registered office, and under s. 103 of that Act it kept a Dominion register of members resident in Canada at its offices at Vancouver. The stock on this register can be transferred only on such register, but all other stock can be transferred only on the register kept in England. More important than these technical details, however, are the following facts, which left it beyond dispute that the company, though of United Kingdom origin, was "resident" in Canada. The company carried on the business of supplying electric power and light and operating electric railways and motor omnibuses in British Columbia, and had its head office at Vancouver. Since 1929 the whole business of the company, except certain formal administrative business, was required by its articles of association to be controlled, managed, conducted and carried on in Canada. All general meetings of the company and all meetings of directors were required to be held in Canada, and all directors were required to be resident in Canada. All its assets, excepting certain records and books of accounts kept at its registered office in England, and certain cash remitted there from time to time, were situated in Canada. All the income from which its dividends were paid was earned in Canada. In short, the undertaking of the company which produced its profits was in every respect Canadian and, in the sense in which "residence" is attributed to an incorporated company for income tax purposes, the "residence" of the appellant was unquestionably Canadian.

The Supreme Court rejected the view of the President of the Exchequer Court and held that "Canadian debtors" means debtors who are resident in Canada and that as applied to companies the phrase is equivalent to companies resident in Canada who owe dividends to their shareholders. Their Lordships agree with this view. It is true that there are sections in the Income War Tax Act where the test of residence in Canada is expressly applied both with respect to individuals and companies, but it does not follow that "Canadian debtors" may not have the same meaning as debtors resident in Canada. If the view contended for by the appellant on this point were adopted, extraordinary results would follow. A Canadian citizen who owed a debt for interest would be caught by the Act wherever he resided, purely because of his nationality. The language of the statute would require him to make a deduction when paying his debt; say, when paying interest on a

loan made to him by a foreigner, though neither of them was residing in Canada, and to transmit the amount deducted to the Receiver-General of Canada. The view which their Lordships reject would require a company registered in Canada but carrying on all its business and making all its profits at the other end of the world, to deduct the amount of the tax when paying a dividend to its shareholder, wherever the shareholder might be found, and whatever his nationality might be, although there was nothing whatever Canadian about the circumstances except the place of registration of the company. It appears to their Lordships that the test to be applied in deciding who is a "Canadian" debtor is not the test of nationality in an individual or of registration in a company, but the test of residence. On this first point, therefore, their Lordships must decide against the appellant. The appellant is within the language of the Act.

Next, it is contended by the appellant that, even though it is to be regarded as a "Canadian" debtor, the duty imposed on it by sub-s. 4 of s. 9B does not, on the true construction of the Act, extend to the case where dividends are being paid to persons who are non-residents of Canada because s. 84 and s. 87 must be regarded as inter-related sections so that the penalty imposed by s. 84 can only be inflicted in instances where the receipt of the Minister under s. 87 constitutes a good discharge of the company's liability to its shareholder in any court in which the shareholder sues for the balance of his dividend. The company, being registered in England, could be sued in an English court for any part of the dividend which was unpaid, and the appellant contends that if this happened the receipt of the Minister under s. 87 would not provide it with an adequate defence for withholding the amount of the tax, and that therefore if the company in such a case withheld the amount of the tax and remitted it to the Receiver-General of Canada, it would have to pay the same amount to the shareholder as well, and thus in effect would itself be taxed instead of the shareholder. This argument is reinforced by pointing out that the tax in question is, by sub-s. 2 of s. 9B expressly imposed on the non-resident shareholder and is not described as a further tax on the company or its profits.

Their Lordships have given full consideration to this argument, which is by no means without weight. But in their view the governing consideration is that s. 84 is absolute in its terms and cannot be read with the qualification that the receipt

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referred to in s. 87 must give effective protection to the company in every case. Their Lordships are therefore not required to decide whether the appellant is right in saying that if a shareholder sued the appellant in England for a portion of the dividend which the appellant has withheld, the receipt of the Minister would, or would not, in an English court provide a valid discharge. The appellant contends it would not, and reference may be made to such cases as *Spiller v. Turner* (1) and *New Zealand Loan and Mercantile Agency Co. v. Morrison* (2), as well as to Dicey's *Conflict of Laws*, 5th ed., p. 678 et seq. The respondent, on the other hand, does not admit that the receipt would fail to provide the appellant with an efficient shield in an English court. Their Lordships' conclusion does not require them to decide on this point of controversy, if controversy there be, for, as already stated, the Board does not take the view that the appellant has no liability to deduct unless s. 87 provides it in all courts with a sufficient discharge. If the shareholder who claims that the appellant has not paid him the full amount to which he is entitled brings his action in the Canadian courts, s. 87 will, of course, provide the appellant with a defence, for Canadian law gives a valid discharge. But whether this is so or not in the event of a shareholder suing the appellant in England, the fact remains that s. 84 requires the appellant to make the deduction and to remit the amount and imposes, without qualification, a liability to the prescribed penalty if it fails to do so. The declared objective of s. 9B, sub-s. 2, is, no doubt, to make the non-resident bear the tax, but the circumstance that the machinery provided by the Act may in certain circumstances work so as to make the company the sufferer, is no reason for construing s. 84 as though it only applied with a qualification which is neither expressed nor necessarily implied. It would, indeed, be exceedingly difficult to determine whether the penalty imposed by s. 84 could properly be exacted if the right to exact it depended on the question in what court an aggrieved shareholder might thereafter sue for his dividend, and what are the correct propositions of private international law which would determine whether the appellant would have a good defence if it was sued in the country of its registration.

Finally, the appellant contends that if the sections of the Income War Tax Act on which this case turns bear the construction set out above, s. 9B, sub-s. 2 (a), is ultra vires the Parliament of Canada, notwithstanding the enlarged scope

(1) [1897] 1 Ch. 911.

(2) [1898] A. C. 349.

conferred by the Statute of Westminster of 1931. The judges of the Supreme Court of Canada have dealt in a most effective fashion with this contention, and their Lordships entirely concur with the views they have expressed. Kerwin J. in a judgment with which the Chief Justice of Canada and Taschereau J. concurred, observed that s. 3 of the Statute of Westminster left no basis for the argument, and he went on: "by head 3 of 's. 91 of the British North America Act [the Canadian] Parliament was authorized to make laws with reference to 'the raising of money by any mode or system of taxation.' 'As long as Parliament legislates with reference to such matters 'the permitted scope of the legislation is not restricted by any 'consideration not applicable to the legislation of a fully 'sovereign state. Such a state may tax persons outside its 'territory. Here it is clear that it has done so and the 'Canadian courts must obey the enactment.'"

Rand J., with whom Kellock J. agreed, put the matter thus: "The legislative competence of Parliament to tax non-residents was challenged. It is argued that the power 'to make laws having extra-territorial operation' as enacted 'by the Statute of Westminster (1931), s. 3, is subject to two conditions: that the legislation deal with matter assigned by 'the British North America Act to the federal legislature; and that it be of such a nature as under international public or private law would be accorded extra-territorial effect. It is then contended that the power of the Dominion under s. 91 (3), 'the raising of money by any mode or system of 'taxation' does not extend to taxation of non-citizens outside 'the boundaries of Canada; and that international comity, 'apart from any rule against giving effect in one state to fiscal measures of another state, would not for any purpose recognize the validity of, much less enforce, what Parliament is said to 'purport by this legislation to do."

"The power of the Dominion to tax is to be interpreted as 'being 'as plenary and as ample within the limits prescribed 'as the Imperial Parliament in the plenitude of its 'power possessed or could bestow': *Hodge v. The Queen* (1). But there is obviously a distinction between the standing of legislative enactments by a sovereign state within its boundaries and beyond them. In an effective sense, a declaration 'by such a legislature that it imposes a tax upon a citizen of a foreign country toward whom there is no internationally

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“ recognized bond or relation, is, beyond the territories of
 “ that state, a futile act, and it is futile for the reason that
 “ beyond them it is incapable of enforcement. Within the
 “ state, however, it becomes an obligatory rule to be enforced
 “ whenever enforcement is feasible. The specific investment
 “ of extra-territorial power by s. 3 of the statute of 1931 was
 “ designed no doubt to remove the generally accepted limitation
 “ of colonial legislative jurisdiction, a limitation which the
 “ courts of the colony itself were bound to recognize : *Macleod*
 “ v. *Attorney-General for New South Wales* (1) : and any such
 “ jurisdictional inadequacy no longer hampers the legislative
 “ freedom of the Dominion. Within its field, there is now a
 “ legislative sovereignty. That the enactment of s. 9B
 “ is an exercise of taxing power within that jurisdiction does
 “ not, I think, admit of doubt. It is an assessment uniformly
 “ imposed in respect of special items of a general class of defined
 “ subject-matter in an elaborated tax system ; there is
 “ admitted jurisdiction over an act essential to the subject-
 “ matter, i.e., the act of performance of an obligation ; and
 “ these, taken with the language used, satisfy the taxation
 “ criteria. Legislation so enacted will be effective in, and must
 “ be enforced by, the courts of this country. To what
 “ extent, if at all, it will receive recognition in the tribunals
 “ of foreign countries depends upon different considera-
 “ tions : but that circumstance, apart from its function in
 “ interpretation, is not one in which the local tribunal is
 “ interested.”

Their Lordships would point out that what is here in issue is the extent of the legislative power of a Dominion legislature having regard to the language of the Statute of Westminster. This is not the same question as the question whether legislative power is so used as to extend beyond what will prove to be effective. A legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account, and the courts of its country must enforce the law with the machinery available to them. The law in this case has been validly enacted, for the effect of the Statute of Westminster upon s. 91 of the British North America Act, head 3, is to make that head read : “ the raising of money by any mode or system “ of taxation, even though such laws have an extra-territorial “ operation.”

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed, with costs.

Solicitors for appellant : *Linklaters & Paines.*
Solicitors for respondent : *Charles Russell & Co.*

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Mar. 28;
April 1;
May 29.

Emergency legislation—War injury—Result of act done “in combating the enemy”—Actual operation against enemy—Personal Injuries (Emergency Provisions) Act, 1939 (2 & 3 Geo. 6, c. 82), s. 3, sub-s. 1; s. 8, sub-s. 1 (a).

In 1941 the military authorities entered into possession of, and laid a minefield on, certain sand dunes. The minefield was enclosed by a six-foot high barbed wire fence, notice boards giving warning of the danger from the mines being placed at intervals of about a hundred yards. In August, 1942, some boys, who had been playing on the sands entered the minefield to recover a ball and, one of them, coming in contact with a mine, caused it to explode, with the result that he was killed and a second boy was injured. They entered the enclosure at a spot where winds had caused the sand to silt up and form a hillock which covered all but the top strand of the barbed wire fence and also buried an adjacent notice board. The injured boy and the administratrix of the estate of the boy who was killed claimed from the army officer alleged to be in control of the minefield at the time of the accident damages for negligence.

Held, that the mines were being used “in combating the enemy” and, accordingly, the injuries sustained were “war injuries” within the definition in s. 8, sub-s. 1 (a) (iii.) of the Personal Injuries (Emergency Powers) Act, 1939, so that, by virtue of s. 3, sub-s. 1, damages were not recoverable in respect of them.

Where an action in respect of a tort is brought against a servant of the Crown, the issues to be tried are those between the parties and the court is not concerned with the fact that the Crown, which is not a party, may stand behind the defendant.

Decision of the Court of Appeal [1944] K. B. 750 affirmed.

* Present : VISCOUNT SIMON, LORD THANKERTON, LORD PORTER, LORD SIMONDS and LORD UTHWATT.

H. L. (E.) APPEAL from the Court of Appeal.

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The facts, stated by VISCOUNT SIMON, were as follows : On the afternoon of August 8, 1942, three boys, Robert Adams, aged twelve, Charles Adams, aged thirteen and Frank Smith, aged thirteen, were playing on the sandhills which fringe the Lancashire coast between Crosby and Southport just above the high-water mark. In 1941 the military authorities, as a provision against enemy attempts at invasion, had constructed a minefield in an area of the sandhills of which they had taken possession, and, to prevent the risk of the public entering the mined area, had surrounded it with a fence about six feet high, consisting of uprights and coils of thick barbed wire, a double coil in the lower part and a single coil above. Against this fence, at intervals of about one hundred yards, notices were affixed in the form of red boards with a warning in white letters of extreme danger and a direction to "keep out." The wind, however, had in places blown the sand so as to alter the contour of the ground and to bury the lower part of the fence. At the place where the boys were playing, a hillock of sand had formed which was sufficient to submerge for a length of some fifteen feet all of the fence except the top twelve or fifteen inches and to cover the lettering of the adjacent notice board. One of the boys kicked a tennis ball over the top strand of wire and in retrieving it Frank Smith happened to cause one of the buried mines to explode and was instantly killed, while the appellant, Robert Adams, was seriously injured. The solicitors who acted on behalf of Robert Adams and the relatives of Frank Smith wrote to the Treasury Solicitor: "We should be obliged if you would furnish us with the name, rank and other particulars of the officer who should be made defendant," and the respondent, Captain James Naylor, an officer of the Royal Engineers, was indicated. The appellant Robert Adams by his father, Alfred Adams, brought an action for damages for personal injuries against him, alleging in the statement of claim that he "was at all material times in control and responsible for the maintenance and safeguarding" of the minefield, and this was admitted by him. The appellant, Mary Smith, the mother of Frank Smith, suing as his administratrix, also brought an action against him for damages for loss of her son's expectation of life. It was alleged that he had been negligent in that (inter alia) he "failed to cause inspection of the fence sufficiently often so as to make sure that it was

"always effective" and "gave no sufficient warning as to the danger." The actions were consolidated and tried by Cassels J., sitting without a jury at Liverpool Assizes. The respondent, giving evidence, was first asked whether he was "the nominal defendant in this matter" and assented. Cassels J. dismissed the actions. The Court of Appeal (MacKinnon L.J. and Morton J., Scott L.J. dissenting) affirmed this decision. The appellants appealed to the House of Lords.

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Rose Heilbron for the appellants. Because of the deadly nature of the mines the respondent was under a legal duty to give proper warning and take precautions to keep both adults and children out of the minefield, though he was not necessarily bound to render the area fool-proof. He was in breach of that duty. As the person in charge of the minefield at the material time he was the only person who should have been sued, since the Crown could not be made a defendant. The Personal Injuries (Emergency Provisions) Act, 1939, s. 3, affords him no defence. In the definition of war injuries in s. 8, sub-s. 1 (a.) (iii.) as physical injuries caused by the doing of any injurious act "either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy," this phrase shows that the legislature had in mind some form of attack on a particular place or an invasion. There must be an enemy. Combat implies active fighting against an actual invader. The words could not apply when there was no enemy to be fought at or near the particular spot. The burying of this mine did not come within s. 8, sub-s. 1 (a.) (ii.) as "the use of any weapon, explosive or other noxious thing . . . in combating the enemy." For such mines to come within the words of the definition it would not be necessary for the enemy to be in their midst. They would be used in combating the enemy when there was an actual or imminent attack. Once the enemy were actually in this country there would have been an actual warlike operation initiated by them by landing here. Also any mines laid on English land by the enemy would bring the case within the Act. If the respondent's interpretation of this section were right no words would have been necessary but "during the present hostilities." Since this section is cutting down the common law rights of the citizen, it should be strongly construed in his favour. The definition of "war damage"

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in s. 80 of the War Damage Act, 1941, supports the appellant's construction of s. 8, sub-s. 1 of the Act of 1939.

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Sir Hartley Shawcross A.-G. and *Nelson K.C.* for the respondent. The respondent has been nominated to defend this action as representing the War Office. No point is taken as to his own personal responsibility. He reserves all the defences which would be open to the Crown, e.g., the prerogative to defend the country in time of war. He assumes the sort of liability which would lie on the Crown if it could be sued, subject to the same defences which might have been available to the Crown, apart from its immunity from being sued. There is no question here of standing behind a particular defendant. [VISCOUNT SIMON. I do not follow this theory of a defendant nominated by the Crown to represent it. The true view surely is that since the Crown cannot be sued for tort, the plaintiff sues the Crown's servant who is himself liable for the tort. Then, if he is proved liable and acting within the scope of his employment, the Crown as an act of grace pays the damages.] Apart from the defences that the boys were trespassers, that all reasonable precautions had been taken to maintain the fencing and that the accident was caused or contributed to by their own negligence, the claims in the actions are barred by s. 3, sub-s. 1, of the Act of 1939, since the injuries sustained were "war injuries" within the definition in s. 8, sub-s. 1, being caused by the use of a mine in combating the enemy. If a British ship coming into a British port were damaged by a mine laid for the protection of the place no action at common law would lie at the instance of the crew, who might be injured, but there would clearly be a right in them to benefit under the scheme authorized by this Act. If shipwrecked British sailors landed on a beach and in crossing it were blown up on a minefield there they would again be within the scheme and so would have no right of action. The use of a mine is not limited to exploding and killing the enemy. It is also a deterrent preventing the enemy from landing at a particular point. That is a use of it in "combating the enemy," even though it may be contemplated that it will never explode. It is "combating the enemy" when it is in its final site, so as to deter the enemy from crossing a particular place or to destroy him if he attempts it. Mines in store or used in manœuvres are not being so used. Such minefields as the one in question were used to deter sabotage raids from aircraft or submarines. There was nothing more that the

military authorities could do with them for the purpose of "combating the enemy" than to put them in their place. H. L. (E.)

Rose Heilbron in reply. If "combating the enemy" had the wide significance suggested the additional words would be unnecessary because then if the mines went off the moment they were laid any injuries inflicted would be war injuries. The fact that the mines were, even on the seaward side, surrounded by barbed wire, shows that no immediate attack was expected and that they were not at once in use when they were laid.

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THE HOUSE dismissed the appeal.

May 29. Their Lordships delivered their reasons.

VISCOUNT SIMON. My Lords, in addition to denying negligence, the respondent pleads that the death of Frank Smith and the injuries to Robert Adams were caused by a "war injury" within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, and that the claims in the action are therefore barred by s. 3 of that Act. Cassels J. decided the case on this ground: Scott L.J. and Morton J. thought that the section did not cover the facts in the present case and reached their respective conclusions on other grounds: MacKinnon L.J. did not deal with the point. After the argument before us on this point was concluded, it appeared that the House was unanimous in holding that the section did apply, and we consequently dismissed the appeal with the intimation that our reasoned opinions would be delivered later.

The Personal Injuries (Emergency Provisions) Act, 1939, was passed on the outbreak of war. Its long title is "An Act to make provision as respects certain personal injuries sustained during the period of the present emergency" and its primary object was to authorize the making of a scheme under which payments might be made out of public funds in respect of war injuries sustained by defined classes of persons. Some such arrangement was obviously called for, since otherwise victims of German air raids (to take one example), would, generally speaking, have no claim for any payment or compensation. The statute provided that the war injuries which would attract payment under the scheme should be such as were "sustained by gainfully occupied persons (with such exceptions, if any, as may be specified in the scheme) and

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“by persons of such other classes as may be so specified” s. 1, sub-s. 1 (a). The scheme applicable at the date when this accident happened was the Personal Injuries (Civilians) Scheme (St. R. & O. 1941, No. 226). In addition to war injuries sustained by a gainfully occupied person, this scheme covers a war injury sustained by a person who either had attained the age of fifteen years at the date of the injury or has attained that age since that date. As a complement to the authorization to bring such a scheme into existence, s. 3 of the Act provides that no compensation or damages shall be payable in respect of war injury such as, apart from the provisions of the Act, would be payable (inter alia) “whether “by virtue of any enactment, by virtue of any contract, or at “common law . . . on the ground that the injury in “question was attributable to some negligence, nuisance or “breach of duty for which the person by whom the com- “pensation or damages would be payable is responsible.” If, therefore, the claim made by or on behalf of these two boys is “a war injury,” s. 3 is a conclusive bar to the claims in this action and any remedy must be sought, instead, in the provisions of the scheme so far as the scheme would cover their case. The definition in the Act of “war injuries” in s. 8, sub-s. 1, is as follows:—“war injuries” means physical injuries (a.) caused by—(i.) the discharge of any missile (including liquids and gas); or (ii.) the use of any weapon, explosive or other noxious thing; or (iii.) the doing of any other injurious act; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy; or (b.) caused by the impact of any person or property of any enemy aircraft, or any aircraft belonging to, or held by any person on behalf of or for the benefit of His Majesty or any allied power; or any part of, or anything dropped from, any such aircraft.

Miss Heilbron, in her excellent argument for the appellants, contended that the injuries to the two boys did not fall within this definition. According to this argument, the burying of the mine which exploded was not “the use of any weapon, “explosive, or other noxious thing . . . in combating the “enemy.” She argued that this language could not apply when there was no enemy at or near the spot to be fought and that “combat” implied active fighting against an actual invader. This was also the view of Scott L.J. and of Morton J. Scott L.J. supported his view by observing that (1) he could

not "think it was the intention of Parliament to take away a civilian's right of action in such a case as the present, and "on ordinary principles of statute interpretation the fundamental right of the subject of coming to the King's courts for redress of wrongs should not be treated as taken away by Parliament except by quite clear language." I think, however, that this view fails to take sufficiently into consideration that the primary object of the Act is not to take away rights of compensation but to make provision for compensation under a scheme which would cover large numbers of civilians who would otherwise not be compensated at all. The list of those covered by the scheme is not the same as the list of those excluded from taking ordinary proceedings, but the primary object of the Act is to give rights rather than to take them away. Morton J. thought (1) that if the words were interpreted to cover this case, as Cassels J. had held, "it might well be held that a person who performs the vital work of filling a shell at a factory is 'combating' the enemy." I do not agree that this would follow, for the preparation of a weapon, to make it ready for use, and even the storing of a weapon till it is used, are quite distinct from the actual using of the weapon. If the mine is not being used when it has been buried in the sand in the hope that the enemy will step on it or, alternatively, in the hope that the barrier of the minefield will prevent him from advancing over it, when is it used? It seems to me that the mine was being used in combating the enemy and the injuries were war injuries caused by this use. The Attorney-General pointed out, by way of analogy, that if one were to imagine British sailors landing on the shore and marching over the minefield with a result that they caused a mine to explode and were injured thereby, it would be natural to say that they were injured because the mines were being "used" in combating the enemy. I agree with the trial judge in thinking that the words do apply to the circumstances we have to consider and that in consequence the claim in the action fails and the appellants are remitted to any rights they may have under the scheme.

What I have said disposes of the matter, but there is one feature of the issues raised, apart from the statute, on which it seems well to add a word. The claim is a claim in tort and since such a claim cannot be made directly against the Crown, it is customary to make it against the servant

(2) [1944] K. B. 765.

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of the Crown whose fault will justify a personal action against him, in the hope, or with the promise that, if the action succeeds, public funds will be used to pay the damages and costs awarded against the defendant. It is the common practice, when a Crown servant may be involved, for the Crown on request to supply the name, for example, of the driver of a Crown vehicle or of the navigating officer of a Crown ship at the time of the accident, otherwise, the plaintiff could in many cases not launch his action at all. It is only fair that the Crown authorities, when appealed to by the plaintiffs to furnish the name of the Crown servant who was in charge of the minefield and responsible for its maintenance, should comply with the request; and in the defence it is admitted that the defendant is the person who was at all material times in control and responsible for the maintenance and safeguarding of the minefield. The question whether he is personally liable is of course a question for the court on the evidence. But it is to me somewhat surprising and, I think, misleading, to refer to him, as the evidence does, as the "nominal" or "nominated" defendant. Such language seems to suggest that the issues at the trial are really issues between the plaintiffs and the Crown and that the defendant is mentioned as a party merely as a matter of convenience. That is not the true position. The courts before whom such a case as this comes have to decide it as between the parties before them and have nothing to do with the fact that the Crown stands behind the defendant. For the plaintiffs to succeed, apart from the statute, they must prove that the defendant himself owed a duty of care to the plaintiffs and has failed in discharging that duty. Whether the plaintiffs in the present case would succeed in doing this it is superfluous to inquire, since the decision goes against them on other grounds; but it may be useful to put on record, in passing, that the success of the plaintiffs would depend on establishing the personal liability of the defendant to them, as the Crown is not in any sense a party to the action.

LORD THANKERTON (read by LORD SIMONDS). My Lords, I have had the opportunity of considering the opinion delivered by my noble and learned friend, and I agree with his reasoning and his conclusion that the consolidated actions are excluded by the Personal Injuries (Emergency Provisions) Act, 1939.

As regards the intervention of the Crown by furnishing

"the name, rank and other particulars of the officer who should be made defendant" it becomes unnecessary to come to a decision in this case as to what its implications are, or as to the meaning of the first question to the respondent in this case whether he was "the nominal defendant in this matter." It is beyond doubt that no claim in tort will lie against the Crown in respect of a wrongful act done by its servants in the performance or supposed performance of their duty; the only remedy, if any, must be against the person who actually committed the wrongful act as personally liable therefor. It would seem to be equally clear that in an action against the person alleged to have actually committed the wrongful act, (1.) any nomination by the Crown is quite unnecessary, and (2.) any suggestion by the Crown as to who actually committed the wrongful act is improper, and may tend to prejudice the defence. It is not for the Crown to say who is, or may be, personally liable. This second point is well illustrated in the present case, in which the respondent appears neither to have been at the top nor the bottom of the ladder of responsibility. On the other hand, there can be no such objection if the Crown merely supplies the name of a member of the forces who is sufficiently identified in the application—as, for instance, if the request is for the name of the driver of the service vehicle, which was involved in the accident, or the name of the member of the forces who was in command of the body of men—large or small—involved in the accident; for that would require no element of selection by the Crown. But that was not the form of request in the present case, which was: "We should be obliged if you would furnish us with the name, rank and other particulars of the officer who should be made defendant."

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LORD PORTER: My Lords, I find myself in complete agreement with the opinion expressed by my noble and learned friend on the woolsack, and I concur in the result.

LORD SIMONDS: My Lords, the facts in this case have been fully stated and I do not restate them. I propose only to say a few words on the question on which we differ from the opinions expressed by Scott L.J. and Morton J. in the Court of Appeal. That question is whether the Personal Injuries (Emergency Provisions) Act, 1939, affords a good defence to the actions brought by the appellants against the respondent.

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My Lords, it is conceded that, if the injuries suffered by the deceased boy Frank Edward Smith and the plaintiff Robert Adams were "war injuries" within the meaning of the Act, the defence must prevail. What then is a "war injury"? Omitting words irrelevant to the present case I find it defined in s. 8, sub-s. 1 (a.) as a physical injury which has been "caused" by . . . the use of any . . . explosive . . . either by "the enemy or in combating the enemy or in repelling an "imagined attack by the enemy." The simple question then is whether these two boys suffered injury by the explosion of a mine which was used in combating the enemy, and by that I mean, was at the time of the explosion being used in combating the enemy. My Lords, it will not I suppose be denied that a mine whether on land or sea may be a weapon of combat. It is a weapon primarily of defence designed to deny the enemy a line of approach or, if he will not be denied it, to destroy or at least delay him. When then is it used in combating the enemy? It was at this point that the learned counsel for the appellants appeared to me to fail to give any satisfactory answer. She rightly, I think, rejected the view that a minefield is used only when the enemy is in the midst of it and was forced to the contention that it was in use in combating the enemy only when the attack was "actual" or "imminent." I do not know what in this connexion the latter word means. But, whatever it may mean, so to limit the use of the mine in combating the enemy appears to me to ignore its function: it will often be the existence of the minefield which prevents the attack from being either actual or imminent: its use and effect are deterrent, but it is none the less used in combating the enemy. I must conclude then, that, as soon as a minefield is laid in situ for the military purpose of preventing the enemy landing at a particular spot or causing him damage and delay if he does so, it satisfies the definition of the Act and that any one who is injured by an explosion of a mine in that field during the war emergency suffers a "war injury."

As the respondent succeeds on this plea, it is unnecessary to deal with any other issue, but I wish to express my emphatic concurrence with what has fallen from the noble and learned Lord on the woolsack in regard to the view that in such an action as this the defendant is merely "nominal" and that the real defendant before the court is the Crown. No one who has experience of these matters will doubt that legislation on the subject of proceedings against the Crown and particularly

in regard to tortious acts committed by its servants is long overdue. It is nearly twenty years ago that the protracted labours of a committee appointed by Lord Birkenhead, whose terms of reference were modified by his successor Lord Haldane, resulted in the production of a draft Bill covering the whole field. Its provisions may not be in all respects satisfactory; at least they would form the basis of discussion. Nothing could indicate more clearly than the circumstances of this case the desirability of clarifying the position, for I must confess that, had it not been for the fact that the Act under consideration afforded a defence to the action, I should myself have had great difficulty in understanding what was the duty alleged to be due from the defendant, an officer in His Majesty's army, to a member of the public in respect of acts done or omitted to be done in course of his military service. I will only say that I am far from satisfied that the problems here involved have been fully appreciated in the course of the proceedings. I agree that the appeal should be dismissed.

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LORD UTHWATT: My Lords, in this case the Crown in the year 1941 as incident to its war operations took possession of some sandhills near the Lancashire coast and thereon constructed a minefield. Two children in August, 1942, trespassed on the land, and one of them thereby caused a mine to explode. He was killed and his companion was seriously hurt. The question at issue under the Personal Injuries (Emergency Provisions) Act, 1939, is whether the injuries so sustained were "war injuries" as that phrase is defined in that Act. The definition of "war injuries" in s. 8, sub-s. 1, of that Act so far as material is as follows:—" 'War injuries' means 'physical injuries (*a.*) caused by . . . the use of any 'weapon, explosive or other noxious thing . . . either by 'the enemy or in combating the enemy or in repelling an 'imagined attack by the enemy.' No one doubts that a mine is an explosive and a noxious thing. The argument for the appellants (the plaintiffs) was that in the circumstances the mine was not being used in combating the enemy. Combating it was said involved active fighting—a view which appealed to Scott L.J.—or involved, as regards land operations the actual presence of an enemy on the soil of this country—a view which appealed to Morton J. To my mind both these views place on the word "combating" an artificial and unduly narrow meaning, not required by the purposes to which the

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Act is directed. On the facts the mines had been put in their final position as instruments of warfare. In that position, and merely by virtue of that position, they were being used in combat; for enemy operations in that locality might be thereby deterred or indeed prevented. Neither actual fighting with the enemy nor the presence of the enemy on the soil of this country is implicit in the functional use of mines as instruments of warfare in combating the enemy. Morton J. was of the opinion (1) that if the word "combating" covered the operations present in this case "it might well be held that "a person who performs the vital act of filling a shell at a "factory is 'combating' the enemy." I do not agree. In substance such a person is not combating the enemy but doing acts enabling someone else to combat the enemy; and under the definition it is the use of a weapon explosive or other noxious thing in combating the enemy—not merely making something for future use in combating the enemy—that is essential. In my opinion therefore the defence based upon the Act succeeds and this appeal should be dismissed.

This conclusion renders it unnecessary to consider whether apart from the defence given by the Act the defendant was under any liability to the plaintiffs, but I desire to make some observations on this part of the case. The allegation made in the statement of claim as to the defendant's connexion with the matter was that he was the officer of the Royal Engineers "in control and responsible for the maintenance and safe-guarding of" the minefield. It was not suggested that he was in possession of the minefield. On the issue under the Act it was proved that the Crown was in possession of the minefield and had laid the minefield, but on the main issue these facts were not pleaded nor was any plea put forward that the maintenance of an unfenced minefield was justifiable as a due exercise by the Crown of its prerogative or statutory powers relating to the defence of the realm. The Crown—the party responsible—did not appear in the picture at all. So far as the pleadings were concerned, the assumption of control and responsibility for the maintenance and safeguarding of an unfenced minefield on land not in his possession appears to be simply an eccentricity on the part of an officer of the Royal Engineers. This divorce from reality was not allowed to continue. A new departure was made. In the proceedings the Crown was standing behind the defendant and apparently by agreement the defendant was treated as the occupier of the

land. The question of the defendant's liability was discussed in the Court of Appeal on that footing. The case pleaded against him was not dealt with. The noble and learned Lord on the wool-sack has emphasized that the establishment of a duty owed by the defendant to the plaintiffs was essential to the plaintiffs' success in the action and, with my noble and learned friend, Lord Simonds, I express my complete concurrence with his observations. It was not open to the parties to this suit by agreement to have the matter dealt with on the footing, proved to be false, that the defendant was in occupation of the land in question. The matter could not be dealt with on the basis wished by the Crown. The case indeed is a good example of the shifts to which the Crown is driven by the maintenance of the rule that against the Crown no action for tort will lie. I agree with what my noble and learned friend, Lord Simonds, has said on the desirability of legislation dealing with the Crown's liability in tort. Such legislation is long overdue and the increasing activities of the state in affairs which affect the ordinary man make the matter urgent. For the Crown—described by Maitland as “the head of a highly organized “corporation aggregate of many”—in the application of this rule embraces the state in all its activities.

Appeal dismissed.

Solicitors for appellants : *Sidney Pearlman for Silverman & Livermore, Liverpool.*

Solicitor for respondent : *Treasury Solicitor.*

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Referred to. In re WARING. [1948] 1 Ch. 221	{ Distinguished. HEATH. [1949] 1 Ch. 170	Re	{ Referred to. Re KOEN- IGSBERG. [1949] 1 Ch. 348

[HOUSE OF LORDS.]

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AND

BERKELEY AND OTHERS RESPONDENTS

Apr. 2, 4, 5.
8, 9, 10;
June 21.

et a contra.

Will—Annuity free of tax given before September 3, 1939—Confirmation by codicil after that date—Provision—When made—Finance Act, 1941 (4 & 5 Geo. 6, c. 30), s. 25, sub-s. 1.

By s. 25, sub-s. 1, of the Finance Act, 1941: “Subject to the “provisions of this section, any provision, however worded, for

* Present : VISCOUNT SIMON, LORD THANKERTON, LORD PORTER, LORD SIMONDS and LORD UTHWATT.

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" the payment . . . of a stated amount free of income tax . . .
 " being a provision which (a) is contained in any deed or other
 " instrument, in any will or codicil, in any order of any court,
 " in any local or personal Act, or in any contract . . . and
 " (b) was made before September 3, 1939; and (c) has not been
 " varied on or after that date, shall, as respects payments falling
 " to be made during any year of assessment, the standard rate of
 " income tax for which is ten shillings in the pound, have effect as if
 " for the stated amount there were substituted an amount equal
 " to twenty twenty-ninths thereof."

A testator by his will, dated November 10, 1936, in exercise of a power of appointment under a settlement, appointed to his wife an annual sum of 1,200*l.* without any deduction except on account of death duties and income tax. He also gave to his step-daughter, free of all duties, an annuity of 1,500*l.* for her life, free of income tax at the standard rate. To each of his executors, one of whom was his wife, he gave an annuity of 200*l.*, free of all duties and income tax. By a second codicil, dated December 3, 1938, he gave his wife " an annuity of such amount as may in any or every year after my death be required to make up to the total sum of 5,000*l.* clear of all death duties and income tax the annual net income to be received by her in that year under my said will (including the appointment . . .) and under my marriage settlement," and he provided that the annuity of 200*l.* was to be taken into account, and that the annuity given by the codicil was itself to be free of all duties and income tax, including surtax. A fourth codicil dated September 14, 1940, provided that the wife's annuity was to be paid in priority to all other annuities, and the step-daughter's annuity in priority to all except that of the wife. It also secured those annuities by charging them on certain specified property of the testator. The testator died on January 15, 1942:—

Held that the " provision " for the payment to be made annually to the wife was not made before September 3, 1939, and accordingly did not fall within the provisions of s. 25, sub-s. 1, of the Finance Act, 1941.

Per Viscount Simon, Lord Thankerton, Lord Simonds and Lord Uthwatt: The phrase " provision, however worded " in the sub-section means the benefit conferred by the document in question and accordingly a provision contained in a will or codicil is not made until the moment of the testator's death.

Per Lord Porter: (1.) The phrase in the sub-section means the words by which the provision is made; (2.) a will or codicil is in general made within the meaning of the section at the time when it is confirmed by a codicil of later date.

In re Waring. *Westminster Bank, Ltd. v. Awdry* (1942) Ch. 426 overruled.

In re Tredgold. *Midland Bank Executor & Trustee Co., Ltd. v. Tredgold* [1943] Ch. 69 explained.

Decision of the Court of Appeal (sub. nom. *In re Berkeley. Borrer v. Berkeley*) [1945] Ch. 107 reversed.

APPEAL from the Court of Appeal.

The facts, summarized from their Lordships' opinions, were as follows: Under a settlement dated June 8, 1888, Randal Thomas Mowbray, Earl of Berkeley, the testator, had in the events which happened, a power of appointing by will that an annual sum not exceeding 1,200*l.* should be paid to any wife who might survive him, during the residue of her life, out of the income of a certain trust fund, in which he had a life interest. Under the marriage settlement, dated November 6, 1924, made on the marriage of the testator and the appellant, Mary Emlen, Countess of Berkeley, his second wife, a fund thereby constituted was settled on trust to pay the income thereof to the testator during his life and after his death to pay the same income to the appellant during her life. By the same settlement the testator covenanted that his legal personal representatives would from and after his death pay an additional annuity of 2,000*l.* to the trustees of the marriage settlement during the remainder of the appellant's life. By his will dated November 10, 1936, the testator, appointed the appellant and the respondent Arthur Borrer to be the executors and trustees thereof and disposed of his free estate in the manner therein appearing, settling Berkeley Castle and certain lands on strict limitations under which in the event (which happened) of his having no son, the respondent, Robert George Wilmot Berkeley become tenant for life with remainder to his first and every other son successively according to seniority in tail male. He bequeathed heirlooms on trusts corresponding with the settled estates. By cl. 2 of his will, in exercise of the power conferred on him by the settlement of 1888, he appointed to the appellant, if she should be living at his death, during the then residue of her life an annuity of 1,200*l.* without any deduction except on account of death duties and income tax. By cl. 24 (A.) he gave to each of his executors and trustees who accepted the office, an annuity of 200*l.* free of all duties and income tax, so long as he or she should continue so to act, each annuity to commence from his death and to be payable by equal quarterly payments, the first payment to be made at the expiration of three months from his death. (The executors named accepted the office.) The testator devised annuities to other persons, including one by cl. 23 (B.): "I give to my "step-daughter Sybil Deane Jackson (spinster) free of all "duties during her life an annuity of 1,500*l.* free of income tax "at the standard rate." (Sybil Deane Jackson was one of the

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respondents in this appeal.) On September 14, 1938, the testator executed a first codicil to his will, which is not relevant to this appeal. On December 3, 1938 he executed a second codicil as follows: "(1.) I give and bequeath to my wife Mary Emlen Countess of Berkeley during her life an annuity of such amount as may in any or every year after my death be required to make up to the total of 5,000*l.* clear of all death duties and income tax the annual net income to be received by her in that year under my said will (including the appointment made by cl. 2 thereof) and under my marriage settlement (which I hereby confirm) dated November 6, 1924 (2.) In calculating the said annuity the annual sum of 200*l.* given by cl. 24 shall be taken into account. (3.) The said annuity shall itself be free of all death duties and income tax and shall be payable quarterly (6.) In this codicil 'income tax' is used to include sur-tax and any other tax from time to time imposed on income. (7.) And in all other respects I confirm my said will as altered by the said former codicil thereto." By a third codicil, dated March 9, 1940, the testator made certain bequests in favour of the appellant and in other respects confirmed his will and the former codicils thereto. By a fourth codicil dated September 14, 1940, he made a number of dispositions and provided by cl. 4: "I declare that every annuity by my said will or any codicil thereto bequeathed to my wife shall be payable in priority to all other annuities or pecuniary legacies by my said will or by any codicil thereto bequeathed and that the annuity by my said will bequeathed to my step-daughter Sybil Deane Jackson shall be payable in priority to all such other annuities or pecuniary legacies as last aforesaid except the annuity or annuities bequeathed to my said wife (which shall have absolute priority). And I charge first the settled estates and secondly the heirlooms (and in that order) with the payment of the annuities hereby or by any codicil hereto bequeathed and the duty on such of them as are bequeathed free of duty so far as my residuary estate shall be insufficient for the purpose." By cl. 5 he authorized the trustees of the will (*inter alia*) to provide for any of the annuities bequeathed by the will and codicils by purchasing an annuity. By cl. 7: "In all other respects I confirm my said will as altered by the said former codicils thereto." The testator died on January 15, 1942, without having revoked or further altered his will. He had remained of sound disposing mind at

least till after the execution of the last codicil. He left no issue but the appellant survived him. An originating summons in the Chancery Division raised the question (inter alia) whether s. 25 of the Finance Act, 1941, which received the royal assent on July 22, 1941, applied to the annuities given to the appellant and the respondent Sybil Deane Jackson. The effect of its application would produce the same result as if the annuities were paid free of income tax at 5s. 6d. in the pound and no more. Cohen J. held that the section was excluded. The Court of Appeal (Lord Greene M.R., Finlay and Morton L.J.J.) reversed this decision holding (1.) that s. 25 applied to both the annuities and (2.) that in the case of the appellant's annuity, for the purposes of s. 25, the stated amount of it was the amount which in each year the trustees must pay to make up the net income to 5,000*l.* The appellant appealed to the House of Lords, the respondents being Robert George Wilmot Berkeley, his son, Robert John Grantley Berkeley, Sybil Deane Jackson and Arthur Borrer. The respondents Robert George Wilmot Berkeley and Robert John Grantley Berkeley cross-appealed.

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Gray K.C. and *Wilfrid Hunt* for the appellant. On the true construction of s. 25 of the Finance Act, 1941, the provision made for the appellant by the will and codicils was not "made" until the date of the testator's death. That was after the outbreak of war on September 3, 1939, and accordingly the section does not apply. The date when the will was made is quite irrelevant; the question is: When was the "provision" made? To say that a "provision" was made must mean an effective provision and a testator cannot make such a provision by will until he dies. Till then it is inchoate. The provision is that which is provided, not the document in which it is contained. The crucial date is September 3, 1939. One must look for a right existing before that date which remained subsisting and unaltered after it. The Act was intended to help people who could not help themselves. Clear words would be necessary before one could impute any other intention to the legislature. The Act was not designed to help a careless testator or one who had a remedy in his own hands. [They referred to *In re Waring. Westminster Bank, Ltd. v. Awdry* (1); *Pyke v. Peters* (2); *Cooper v. Martin* (3) and *In re Elcom. Laybourn v. Grover Wright* (4).] Alternatively the express confirmation of the will

(1) [1942] Ch. 426.

(3) (1867) L. R. 3 Ch. 47.

(2) [1943] K. B. 242.

(4) [1894] 1 Ch. 303.

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and earlier codicils by the third and fourth codicils after the date of the outbreak of war post-dates the provision for the appellant in respect of her annuities so that it operates after the war date and accordingly s. 25 does not apply to them. A will plus a codicil is a new testamentary disposition and a deed confirming another deed is a new bargain superceding the old. [They referred to *Doe dem. York v. Walker* (1); *Anderson v. Anderson* (2); *In re Blackburn, Smiles v. Blackburn* (3); *In re Champion. Dudley v. Champion* (4); *In re Rayer. Rayer v. Rayer* (5); *Goonewardene v. Goonewardene* (6); *Grealey v. Sampson* (7); *In re Tredgold. Midland Bank Executor & Trustee Co., Ltd. v. Tredgold* (8); *In re Smith. Blake v. Roper* (9); *In re Fraser. Lowther v. Fraser* (10); *In re Reeves. Reeves v. Pawson* (11); *In re Sebag-Montefiore. Sebag-Montefiore v. Alliance Assurance Co., Ltd.* (12.) Alternatively the fourth codicil amounted to a variation of the provision for the payment of both the annuities within the meaning of s. 25, which accordingly does not apply to either of them. In any event the fourth codicil varied the provision for the appellant's codicil annuity and on this ground s. 25, sub-s. 1 (c) does not apply to it. The only logical interpretation of the intentions of the legislature is that, the parties having made a bargain which turns out to be bad, the Act is to intervene to make it less bad, but if there has been a variation after the war date, the parties have made their own bargain and are outside the Act altogether. [They referred to *In re Sebag-Montefiore* (12); *In re Westik. Public Trustee v. Middlesex Hospital* (13) and *Dudley v. Dudley* (14).] In any event the provision for the appellant's codicil annuity is not a provision for payment of a "stated amount" within s. 25 which accordingly does not apply. Further, on the cross-appeal, even if the appellant's codicil annuity is for a "stated amount" within the section, that amount is not the whole 5,000*l.* a year, which includes the income payable to her under the settlements, and the provisions for payment of that income were not tax free provisions. The "stated amount" is only the amount necessary to make up the sum of 5,000*l.* [They referred to

(1) (1844) 12 M. & W. 591.

(2) (1872) L. R. 13 Eq. 381.

(3) (1889) 43 Ch. D. 75.

(4) [1893] 1 Ch. 101.

(5) [1903] 1 Ch. 685.

(6) [1931] A. C. 647.

(7) [1917] 1 Ir. R. 286.

(8) [1943] Ch. 69.

(9) (1890) 45 Ch. D. 632.

(10) [1904] 1 Ch. 726.

(11) [1928] Ch. 351.

(12) [1944] Ch. 331.

(13) [1943] Ch. 3.

(14) [1944] K. B. 264.

Holmpatrick v. Ainsworth (1); *In re Hawkins*. *King v. Hawkins* (2) and *In re Bird*. *Henn v. Birch* (3).] H. L. (E.)

Wilfrid Hunt following. For all purposes the disposition must be treated as having been made at the date of the codicil and not of the will: see *In re Fraser* (4). The fourth codicil was dated September 14, 1940, after income tax had been increased by ss. 6 and 7 of the Finance Act (No. 2) 1940, which received the royal assent on August 22, 1940. As to the point that the codicil annuity is not a "stated amount," it does not come within the definition of "stated" in the Oxford English Dictionary: "Of times, amounts, etc.: Fixed or settled by

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David Jenkins K.C. and *J. H. Stamp* for Robert George Wilmot Berkeley and Robert John Grantley Berkeley, the respondents and cross-appellants. The provisions contained in the will and the second codicil respectively were "made" for the purposes of s. 25 when they were respectively executed and attested, i.e., before September 3, 1939. A deed is made when it is signed, sealed and delivered although its provisions may not come into operation until much later. A private Act of Parliament settling an estate is made at the date of the giving of the royal assent, although its coming into operation may be postponed. Both testamentary and non-testamentary documents are treated in the list in s. 25, sub-s. 1 (a) without any distinction between dispositions inter vivos and dispositions of a testamentary character. Accordingly the word "made" must be given the same meaning whether it occurs in a deed, a will or a codicil and that meaning is "duly signed and attested." It is made when it is brought into existence as a valid instrument of its class. It is not necessary that it should be operative. This is in accordance with the definition of "provision" in the Oxford English Dictionary: "Each of the clauses or divisions of a legal or formal statement, or such a statement itself, providing for some particular matter." Thus a will with the provisions it contains is made when it is duly executed and attested in accordance with the Wills Act, 1837, though it does not come into operation till the testator dies and though in the meantime it may be unmade. When one says that a man has "made" a will that is only a compendious way of saying that he has made certain dispositions of his property to take effect after his death unless revoked or varied by subsequent testa-

(1) 1943 S. C. 75.

(2) [1943] Ch. 67.

(3) [1944] Ch. 111.

(4) [1904] 1 Ch. 726, 734.

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mentary dispositions, since the act of making the provisions is the act of making the will. This interpretation of the word "made" is in accordance with its use and that of the word "making" in ss. 7, 8, and 11 of the Wills Act. It is supported, moreover, by the requirement against variation in s. 25, sub-s. 1 (c) of the Act of 1941. That clause assumes that a will or codicil can be varied by its author, whereas on the construction urged by the appellant he could not do so. [Lord Thankerton : In Scottish law a will is presumed to be made in the last hour of life : Erskine's Institutes, Bk. 3, Tit. 3, s. 44, Bk. 3, Tit. 9, s. 5 ; Bell's Principles (Guthrie 1899), s. 1864 ; McLaren on Wills and Succession, 3rd. ed., vol. 2, pp. 775-9, ss. 1415-6 and *Nimmo v. Murray's Trustees* (1).] In England a will speaks from death and there is no substantial difference between the law of the two countries. There is nothing in Scots law to prevent the words here in question being construed according to their natural meaning. On either side of the Border it is equally inconceivable that if the legislature had meant what the appellants suggest, it would not have said so. Accordingly *Income Tax Commissioners v. Pemsel* (2) is not relevant. There is no conflict in this matter. Further, the subsequent confirmation of the testator's will and codicils did not operate to alter the dates of the will and second codicil. When a testator by a final codicil acknowledges the existence of his will and any intermediate codicil so constituting his last will he is only saying in effect that those earlier testamentary papers still represent his testamentary intentions notwithstanding any defect there may have been in any of the gifts originally made or any alteration in the circumstances concerning his property or the beneficiaries to whom he is giving it. A confirmatory codicil does not alter the date of the previous instrument : see *Rolfe v. Perry* (3). Even where there is re-publication of a will it does not always follow that the date of the will becomes the date of re-publication : see *Hopwood v. Hopwood* (4) ; *In re Park. Bott v. Chester* (5) ; *In re Elcom* (6) ; *In re Moore. Long v. Moore* (7) ; *In re Blackburn* (8) and *Cooper v. Martin* (9). This is supported by s. 34 of the Wills Act, 1837, which enacted that the Act should not apply to any will made before 1838 and that any will re-executed or re-published by any codicil

(1) (1864) 2 M. 1144.

(2) [1891] A. C. 531.

(3) (1863) 3 De G. J. & S. 481.

(4) (1859) 7 H. L. C. 728, 740.

(5) [1910] 2 Ch. 322.

(6) [1894] 1 Ch. 303, 305.

(7) [1907] 1 Ir. R. 315, 319.

(8) 43 Ch. D. 75.

(9) L. R. 3 Ch. App. 47.

should for the purposes of the Act be deemed to have been made at the time at which it was re-executed or re-published. If republication had the effect contended for by the appellant the part of the section relating to it would have been unnecessary for the purpose intended by the legislature. But it was clearly assumed that the effect would have been that suggested by the respondents and that without the additional part of the section the Act would not have applied to any will made before it, even though re-published after it. Further, in s. 25, sub-s. 1, of the Act of 1941 confirmation of a will, unlike variation does not expressly except it from the operation of the section. Accordingly it is to be inferred that provisions merely confirmed on or after September 3, 1939, whether contained in a deed or in a will or codicil, are not excluded from the operation of the section. It is not to be presumed that the testator framing the provisions of his will and his second codicil before the outbreak of war contemplated the enormously increased war-time rates of taxation and one cannot impute to him the intention that those provisions should have full effect so that this annuity would swallow up so much of the estate. He must be presumed to have known of s. 25 of the Act of 1941 and to have left these provisions unaltered in the faith that the section would make the proper adjustment. The provisions contained in the will and second codicil were not varied within the meaning of s. 25. Adding security did not vary the terms of the provisions as originally framed any more than it would have been a variation to take away something which had formerly been a security. Nor are the directions as to priority a variation. The directions in the fourth codicil inferentially confirmed the previous provisions and confirmation, as opposed to variation does not exclude the operation of s. 25. Further, the provision was for the payment of a "stated amount." It is none the less a "stated amount" because it can only be arrived at after a calculation; it is fixed by reference to a formula: see *In re Hawkins* (1); *In re Bird* (2) and *Holmpatrick v. Ainsworth* (3). For the purposes of s. 25 the "stated amount" is 5,000*l*.

J. H. Stamp following. The mischief with which s. 25 seeks to deal arises out of the cumulative effect of rising taxation producing an increased burden in respect of tax free payments. This burden is the same whether the disposition be a primary gift of a tax free annuity of a stated amount or a disposition in

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(1) [1943] Ch. 75.

(3) 1943 S. C. 75.

(2) [1944] Ch. 111.

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such a form as that in the present case. A provision to make up other income, from whatever source, to a stated amount free of income tax is a provision for the payment of that stated amount free of income tax within the meaning of s. 25. The joint effect of the settlement of 1888, the marriage settlement of 1924, the will and the second codicil was that a provision within the meaning of the section was made and it is legitimate to take these documents into account. As to the date when the provision was made, in the ordinary speech of England and Scotland the date of the making of a will is the date of its execution : see *Nimmo v. Murray's Trustees* (1). This accords with the remedy provided by the Act which is to alter the effect of previous instruments executed when the persons executing them could not know to what height tax would rise.

Hewins for the respondent Sybil Deane Jackson, supported the arguments for the other respondents.

Gray K.C. in reply. The date of the execution of the will is irrelevant. The question is : when was the provision made ? The date of the provision in the second codicil is at any rate brought down to that of the fourth codicil. But the effective provision was made at the date of the testator's death, and in the case of a will the Act should apply only when the testator's death occurred before September 3, 1939. This would be to read the Act in a sensible way so as to accord both with the law of England and that of Scotland, as such an Act should be construed. *In re Waring* (2) was wrongly decided. *In re Tredgold* (3) was rightly decided. *In re Moore* (4) is distinguishable.

THE HOUSE took time for consideration.

June 21. VISCOUNT SIMON. My Lords, this is an appeal and cross-appeal from a unanimous decision of the Court of Appeal composed of Lord Greene M.R., Finlay and Morton L.JJ. The question to be decided was raised by originating summons and concerns the applicability of s. 25 of the Finance Act, 1941, to the first clause of the second codicil to the will of the late Earl of Berkeley. The first sub-section of s. 25 of the Finance Act, 1941, is as follows : " Subject to the provisions of this " section, any provision, however worded, for the payment, " whether periodically or otherwise, of a stated amount free of " income tax, or free of income tax other than sur-tax, being a

(1) (1864) 2 M. 1148.

(2) [1942] Ch. 426.

(3) [1943] Ch. 69.

(4) [1907] 1 Ir. R. 315, 319.

“ provision which (a) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing; and (b) was made before September 3, 1939; and (c) has not been varied on or after that date shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is ten shillings in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.” The effect of substituting twenty twenty-ninths for the whole of the stated amount is the same as if the stated amount were paid free of income tax at 5s. 6d. in the pound and no more, while the balance is left to be borne by the recipient.

In support of the contention that s. 25 has no application to this case Mr. Gray, on behalf of the appellant, the Countess of Berkeley, the testator's widow, advances four propositions:— (a) He first contends that a “ provision ” contained in a will or codicil, within the meaning of s. 25, is not “ made ” until the moment of the testator's death. (b) If this contention fails, he contends as an alternative that the “ provision ” made in the second codicil must be treated as made at the date of the fourth and last codicil because this last named codicil confirms the previous testamentary dispositions including the second codicil. If either of these contentions prevails, the “ provision ” for the payment to be made annually to the Countess free of income tax would be made after September 3, 1939, and would therefore be untouched by s. 25. (c) He contends that in any case the “ provision ” is not for the payment of a “ stated amount ” free of income tax. (d) Lastly, he contends that in any case the “ provision ” has been “ varied ” by the fourth codicil and therefore is excluded from the operation of s. 25 by failing to fulfil para. (c) of the sub-section. The Court of Appeal reached a conclusion adverse to each of these four contentions. I should agree with that court, for the reasons they state, as regards (b), (c) and (d), but while I am fully alive to the force of the argument which prevailed with the Court of Appeal, as regards (a), I have after much consideration come to the conclusion that the first proposition is correct. The crucial question is what is the meaning of the phrase “ any provision, however worded.” It may mean, as the Court of Appeal thought, the words which define a benefit and which are contained in the document or oral contract referred to in the section. Or it may mean the

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H. L. (E.) benefit conferred by such a document or oral contract. If it bears the first of these meanings, it is to be found in the language of the document or oral contract and is necessarily of the same date, being in effect equivalent to a clause. If it means the second, its date will be the date when the benefit is conferred. Either meaning is possible in construing para. (a) and para. (c) of the section, but I am forced to the conclusion that only the second meaning is possible when construing para. (b), and if this is so in construing para. (b), the same meaning must be given to the words when applying para. (a) and para. (c). Thus, "any provision, however worded" must be understood in all cases to refer to a benefit conferred and not to the words conferring it. My reasons for thinking that this is the correct construction are as follows:—There is a clear distinction drawn in the section between a provision "contained" in a document irrespective of date and a provision "made" before September 3, 1939. Language is very ineptly used if one speaks of "making" a clause. It is not the instrument, but the provision, for which a latest date is prescribed. Moreover, all the other documents mentioned except a will or codicil are such as would confer a vested right to the payment of the annuity free of tax—a benefit which was created at a time when income tax at 10s. in the pound was in no one's thoughts. It was the existence of this vested right which involved a hardship when income tax was greatly raised, for it used up far larger resources in meeting the tax-free annuity than anyone had contemplated. This hardship was one which only an Act of Parliament could relieve, in the absence of agreement between the beneficiary and the sufferer of the hardship. It is the making of such an agreement after the war broke out which is referred to, I think, in para. (c). The will of a living testator, on the other hand, confers no right on anyone to any benefit therein mentioned. Even if it existed side by side with a covenant not to revoke, the covenantee has no rights under the will until the testator is dead. There is therefore no call for statutory intervention in this case. It is true enough that a testator, using popular language, may say "I have made provision by my will for so-and-so," but this consideration does not help in construing an Act of Parliament which, as I read it, authorizes variation of vested rights only if they arose before the outbreak of the late war. I do not think that it would be a legitimate construction of the section to run (a) and (b) together and read them as though the crucial date was contained

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in (a). I had at first been much impressed by the argument that if on the true construction of the section the testator must be dead before the late war broke out, his will could not be varied after that date. But the answer is that which I have indicated above, viz.: that what is contemplated is not the variation of a will but the variation of a provision made by the will which conferred upon the annuitant a vested right from the moment of the testator's death. There may well have been many cases between September 3, 1939, and the announcement of the proposal which became s. 25 of the Finance Act, 1941, when the parties concerned, feeling the inequity involved if strict effect was given to the provisions of the will, had by agreement varied the operation of the provision (in the sense of the benefit) which the testator had made. Where this had happened, as, for example, between a tax-free annuitant and the party entitled to the residue, there would be no call for statutory intervention and the agreement to vary would stand. On the view which I have been led to form, and the reasons for which I have above stated, no other question arises for decision in this appeal and the appeal must be allowed. The result is that Farwell J. was right in *In re Waring* (1), and cases like that discussed in *In re Tredgold* (2) should be decided on the ground that the testator died after the outbreak of the war.

By the cross-appeal it was contended that the "stated amount" was 5,000*l.* and not the sum needed to make up that total free of tax after taking into account what is received from the other sources named, and I agree with the Court of Appeal, for the reasons it gives, that the cross-appeal fails. I move that the appeal be allowed and that the cross-appeal be dismissed.

LORD THANKERTON. My Lords, this appeal and the cross-appeal raise questions as to the proper construction of s. 25 of the Finance Act, 1941. They arise out of the testamentary writings of the late Earl of Berkeley, who died on January 15, 1942. He had no issue, but his second wife, the present appellant, survived him. The subject matter of the appeal and cross-appeal are the annuities given to the appellant under the will and codicils of the testator. In the view that I take of the matter, the only relevant portion of s. 25 of the Finance Act, 1941, is sub-s. 1, which is as follows: "Subject to the provisions " of this section, any provision, however worded for the pay-

(1) [1942] Ch. 309.

(2) [1943] Ch. 69.

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H. L. (E.) “ ment, whether periodically or otherwise, of a stated amount
 1946 “ free of income tax, or free of income tax other than sur-
 BERKELEY “ tax, being a provision which (a) is contained in any deed or
 v. “ other instrument, in any will or codicil, in any order of any
 BERKELEY. “ court, in any local or personal Act, or in any contract, whether
 “ oral or in writing ; and (b) was made before September 3,
 Lord “ 1939 ; and (c) has not been varied on or after that date.
 Thankerton. “ shall, as respects payments falling to be made during any
 “ year of assessment, the standard rate of income tax for which
 “ is ten shillings in the pound, have effect as if for the stated
 “ amount there were substituted an amount equal to twenty
 “ twenty-ninths thereof.”

On behalf of the appellant four contentions were submitted :
 (a) that the provision for payment of the appellant's annuity,
 which is contained in the second codicil, was not “ made ”
 within the meaning of sub-s. 1 of s. 25, until the death of the
 testator, which was after the war date, and therefore the Act
 did not apply ; (b) alternatively, that the last confirmation of
 the provision by the fourth codicil, postponed the date at which
 it was originally made until the date of such confirmation,
 which, again, was after the war date ; (c) the provisions of the
 fourth codicil in relation to the appellant's annuity constituted
 a variation after the war date, within the meaning of head (c) of
 the sub-section, and therefore, the statute did not apply ;
 and (d) that the provision made was not “ of a stated amount ”
 within the meaning of the sub-section, and, accordingly, the
 statute did not apply. A fifth question arose on the cross-
 appeal, namely, whether “ the stated amount ” in this case is
 5,000*l.* or only the sum required, under the provisions of the
 second codicil, to make up the appellant's net income to
 5,000*l.* The Court of Appeal had taken the latter view.

The Court of Appeal was bound by its previous decisions,
In re Waring (1) and *In re Sebag-Montefiore* (2). In the
 first of these cases it was held that the provision for two
 annuities by a will signed and attested before the war date,
 was not made as at the death of the testator, which occurred
 after the war date, but was made at the date of the will, and
 that a codicil made after the war date, which contained no
 reference to the annuities and no express confirmation of the will
 did not cause the provision to be treated as made at the date of
 the codicil. In the second of these cases, the will bequeathing
 the annuities was made before the war date, and a codicil made

(1) [1942] Ch. 426.

(2) [1944] Ch. 331.

after the war date which expressly confirmed the will was held not to have the effect of causing the provision to be treated as made at the date of the codicil. My Lords, it is clear that an acceptance of the appellant's first contention that the provision is not made until the death of the testator, would involve that s. 25 does not apply to the present case, and the remaining questions in the case disappear. The appellant's fourth contention might arise in another case, and so might the question raised by the cross-appeal. In *Waring's* case (1) the Court of Appeal reversed the decision of Farwell J., whose opinion I venture to quote (2): "The question for my determination is whether or not s. 25 of the Finance Act, 1941, applies to a will made before September 3, 1939, by a testator who died after that date. It is not until the death of a testator that provisions contained in a will take effect, and, therefore, in my judgment, the provision with which I am concerned here was not 'made' until after September 3, 1939. Until the death of the testator the will was a document bearing date before September 3, 1939, but it had no effect. Section 25 of the Finance Act, 1941, therefore does not apply." The learned Master of the Rolls, Lord Greene, found no distinction between the date of making a will and the date of making a provision contained in a will, and he sought confirmation of his view in head (c) of the sub-section, "has not been varied after that date," and added (3): "If Mr. Vaisey's argument and the judgment of the learned judge were correct, that paragraph could have no application whatsoever to a provision by will because, if the provision can only be deemed to be made when the testator dies, it is quite obvious that it never can be varied after his death." MacKinnon L.J., who agreed with the Master of the Rolls, did not consider the important question whether there was any distinction intended between the date of making the will and the date of making the provision which is contained in the will. Luxmoore L.J. concurred. My Lords, I regret that I am unable to agree with the reasoning or the conclusion of the Master of the Rolls. To me the draftsman has been careful to draw a distinction between the date of the will and the date when the provision was made, and the reason is that, as the Master of the Rolls said (4), "the legislature intervened and adjusted the burden between the classes of persons benefiting under the wills." He might have added

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(1) [1942] Ch. 426.

(3) [1942] Ch. 426, 431.

(2) [1942] Ch. 309, 310.

(4) Ibid. 430.

H. L. (E). that at the same time it was adjusting the obligations as between payer and payee under the deeds, orders of court, local or personal Acts or contracts, and in each of these cases there must be an existing right or obligation, and any variation must be a variation of an existing right or obligation. I have difficulty in thinking that variation as regards a provision contained in a will was intended to be different in character, so as to cover an alteration by the testator, which created no immediate right, and when there was no payer, no payee and no payment to adjust. The word "provision" may ordinarily be used in either of two senses, (1.) as the clause in the will directing the tax-free annuity—i.e., the benefit—to be paid, or (2.) as the benefit provided for the annuitant. In my opinion, it is clearly used in the sub-section in the latter sense. If the former meaning was intended, heads (a) and (b) would naturally and easily be combined by substituting "made by" for "contained in," by deletion of the word "and" at the end of (a) and adding "made before September 3, 1939." In short, the legislature was dealing with rights known to the law, and was adjusting such rights. I come to that conclusion independently of, but in agreement with the presumption to which I will now refer, and which I could wish had been under consideration by the Court of Appeal.

In the case of taxing statutes, which apply to both England and Scotland, and where, as here, there is no suggestion that any of the language used has a technical legal meaning in either country, it is to be presumed that the legislature intended that the incidence of taxation should be the same in both countries. In *Income Tax Commissioners v. Pemsel* (1), Lord Watson says: "The only principle derivable from *Lord Saltoun v. Lord Advocate* (2), which can aid in the decision of this case, appears to me to be this—that the Act of 1842 must, if possible, be so interpreted as to make the incidence of its taxation the same in both countries." In *Lord Advocate v. Moray* (3), Lord Macnaghten says, "It must be borne in mind that the Act which your Lordships are now called upon to construe in its application to Scotland applies equally to the whole of the United Kingdom. It is a taxing Act. It must be presumed to have been the intention of Parliament to make the incidence of the taxation the same in Scotland as in England and Ireland, and to extend the same measure of relief"

(1) [1891] A. C. 531, 557.

(2) (1860) 3 Macq. 659.

(3) [1905] A. C. 531, 538.

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I understand that some of your Lordships are of opinion that the section is reasonably capable of another construction. In that view, it would follow, in my opinion, that, if the section under consideration is thus reasonably capable of two constructions, one is bound to adopt the construction which is in harmony with the presumption, even if, otherwise, one would prefer the other one. The construction which I prefer is in harmony with the presumption; the other is not. There can be no dubiety as to the law of Scotland in this matter. "A will may be made (and is presumed in law to be made) in the last moment of life, and so it is at all times during life revocable."—Bell's Principles (Guthrie 1899), s. 1864. These are Professor Bell's own words; he died in 1843. In *Hyslop v. Maxwell's Trustees* (1), Lord Corehouse said, in reference to Miss Hyslop's power of disposal under her uncle's will: "A circumstance much founded on by the defenders, namely, that her settlement was executed before she knew of her uncle's legacy, is quite immaterial. It is settled that a testamentary and revocable deed is to be held as the ultima voluntas testatoris, that is, as approved of, and confirmed down to the last hour that he is of a disposing mind." Lord Balgray said (2): "It is clear that the settlement, though originally executed many years before Miss Hyslop's death, did, so long as it existed unrevoked, manifest a continuous act of the will on her part, giving it the same force as if executed in the last moment of her retaining a disposing mind. It must therefore carry everything which it would have carried, if originally executed the day before her death." In *Nimmo v. Murray's Trustees* (3), the trust disposition and settlement, under which the residue was left to "my own nearest heirs and successors," was executed prior to the passing of the Intestate Movable Succession Act, 1855, by which representation was introduced into intestate movable succession. The testator died after the Act had come into operation. After quoting the words of Lord Corehouse in *Hyslop's* case (1), Lord Cowan said (4): "When, therefore, this testator died, leaving to his 'nearest heirs and successors' the residue of his estate, the same construction must be applied to the bequest as if the deed had been written out and executed by him at the last moment of his being of a disposing mind." Lord Justice-Clerk Inglis expresses the same view as Lord Cowan. See also

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(1) (1834) 12 S. 413, 416.

(3) (1864) 2 M. 1144.

(2) Ibid. 417.

(4) Ibid. 1148.

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McLaren on Wills and Succession (3rd ed.), vol. 2, pp. 778 and 808. In the present case, the testator remained of a sound disposing mind at least till after the execution of his last codicil, if not until his death, and, if this had been a Scottish succession, the result in Scotland of the construction adopted by the Court of Appeal in *In re Waring* (1) would be that the provision was made at a date at least subsequent to the date of the last codicil, and therefore after the war date. This would make a marked difference in the incidence of taxation in the two countries respectively. I am accordingly of opinion that the decision of the Court of Appeal in *In re Waring* (1) was wrong, and that all these somewhat artificial questions as to republication or confirmation or variation need never have arisen to complicate the matter. As I have said, this supersedes consideration of any of the other contentions in the appeal and cross-appeal, but I desire to add that, while I have formed no definite view, I am inclined to agree with the opinion of the learned Master of the Rolls (2) as to the decision in the Scottish case of *Holmpatrick v. Ainsworth* (3). I am therefore of opinion that the appeal should be allowed and that the cross-appeal should be dismissed.

LORD PORTER. My Lords, The question for your Lordships' determination is the effect of s. 25 of the Finance Act, 1941, upon the series of testamentary dispositions made by the testator. Sections 25 and 27 of that Act are as follows :—

“ Tax free Payments, &c.

“ 25.—(1.) Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than sur-tax, being a provision which—(a) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing; and (b) was made before September 3, 1939; and (c) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is ten shillings in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof. (2.) Where any such provision as is mentioned in sub-s. 1 of this section is a provision for a pay-

(1) [1942] Ch. 424.

(3) 1943 S. C. 75.

(2) [1945] Ch. 107, 112, 113.

“ment free of income tax (and not merely a provision for a
 “payment free of income tax other than sur-tax) the sum, if
 “any, to be paid under that provision to make good the
 “requirement that the payment shall be free of sur-tax shall,
 “in the case of sur-tax for the year preceding any such year
 “of assessment as is mentioned in the said sub-s. 1, be reduced
 “to twenty twenty-ninths of the sum which would have been
 “sufficient for that purpose if the rates of sur-tax in force for
 “the year 1937-38 had applied to the year for which the sur-
 “tax is payable. (3.) A person who is entitled under any
 “such provision as is mentioned in sub-s. 1 of this section to a
 “payment free of income tax, or free of income tax other than
 “sur-tax, shall be entitled to the following adjustment of his
 “sur-tax for the year 1940-41, that is to say, his total income for
 “that year, so far as it is ascribable to his rights under that
 “provision, shall be reduced to what it would have been if in
 “his case—(a) the rates of sur-tax in force for the year 1937-38
 “had applied also to the years 1938-39, 1939-40 and 1940-41;
 “and (b) the 1938-39 rates of income tax, other than sur-tax,
 “had applied also to the years 1939-40 and 1940-41; and
 “(c) the rights and liabilities of the persons concerned had
 “been modified accordingly. (4.) If, in the case of a payment
 “to which sub-s. 1, of this section applies, the relations of the
 “payee and payor are such that the payee is accountable to the
 “payor for so much of any relief from income tax which he
 “receives as is ascribable to the payment—(a) the liability of
 “the payee to account to the payor shall be limited to twenty
 “twenty-ninths of the sum for which he would have been
 “accountable if the 1938-39 rates of income tax, other than
 “sur-tax, had applied to the year of assessment in which the
 “payment falls to be made, and the foregoing provisions of this
 “section had not passed; and (b) the relief to be given shall
 “be calculated as if (i.) the gross sum represented by the
 “payment were what it would have been if the 1938-39 rates
 “of income tax, other than sur-tax, had applied to the year of
 “assessment in which the payment falls to be made, and the
 “foregoing provisions of this section had not passed; and
 “(ii.) that gross sum had borne income tax at ten shillings in the
 “pound. (5.) This section shall not—(a) affect any provision
 “falling with r. 23 of the General Rules (which renders invalid
 “agreements not to deduct tax); (b) affect any provision if,
 “by virtue of any provision in the same or any other deed,
 “instrument, will, codicil, order, local or personal Act or

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 1946 “ the payments thereunder have ceased, or, in the event of
 “ further rises in the rates of income tax, may cease, to be wholly
 BERKELEY “ free of income tax, or, as the case may be, wholly free of in-
 v. “ come tax other than sur-tax ; (c) apply to any emoluments of
 BERKELEY. “ any office, employment, annuity, pension or stipend taxed
 Lord Porter. “ under sch. E. ; or (d) apply to any dividends or shares
 “ of profit.

* * *

“ 27.—(1.) For the purposes of the provisions of this Act
 “ relating to tax free payments—(a) a provision, however
 “ worded, for the payment of such sum as will after deduction
 “ of income tax be equal to a stated amount, shall be treated
 “ as a provision for the payment of the said stated amount
 “ free of income tax, other than sur-tax ; and (b) the expression
 “ ‘ a stated amount ’ includes a stated fraction of the gross
 “ amount of any specified income (that is to say, of the amount
 “ of that income before income tax has been charged thereon,
 “ whether by deduction or otherwise), but does not include a
 “ stated fraction of the net amount of any specified income (that
 “ is to say, of the amount of that income after it has been
 “ charged to income tax, whether by deduction or otherwise) ;
 “ (c) the expression ‘ if the 1938-39 rates of income tax, other
 “ than sur-tax, had applied ’ means, in relation to a year of
 “ assessment, if the standard rate of tax for the year had been
 “ five shillings and sixpence in the pound and the provisions
 “ of the Income Tax Acts relating to relief from tax had not
 “ been amended in any respect by any Act passed since
 “ September 3, 1939. (2.) The Treasury may by regulations
 “ provide for adjustments between parties where payments to
 “ which the said provisions of this Act apply have been made
 “ before the passing of this Act otherwise than in accordance
 “ with those provisions.”

Having regard to the terms of these sections, your Lordships have to determine whether s. 25 applies to the sum secured to Lady Berkeley by the fourth codicil so as to reduce it or part of it by nine twenty-ninths. On the respondent's part it was said that the provision for payment free of income tax was of a stated amount—viz., 5,000*l.*—was contained in the second codicil, was therefore made before September 3, 1939, and had not been varied since that date. All these contentions were controverted by the appellants, who maintained that—(1.) Provision made by will or codicil is not made until the testator's death.

(2.) Even if it be made at the date of execution of the document, the material date is that of the fourth codicil, which confirmed the will. (3.) The fourth codicil is a variation of the provision, and (4.) in any case there is no stated amount.

(1.) My Lords, it is common ground that a will or codicil comes into operation on the death of a testator. Until then so long at any rate as he has testamentary capacity, it is revocable, or to use the common phrase, ambulatory. Indeed, as my noble and learned friend Lord Thankerton has pointed out, by the law of Scotland it is correctly described as made at the last moment at which it is revocable. If I thought the wording of the section ambiguous I should, in an Act applicable to both England and Scotland, give such an interpretation as would best accord with the meaning which it would plainly bear under one of the two systems of law, though it might be doubtful under the other. But, speaking for myself, I do not consider the meaning doubtful. It is true that the word *provision* has more than one meaning. It may be used to indicate the thing provided or the words by which provision is made, and it was urged that in this section it bore the first meaning. It was, it was said, "made" when it came into operation; until then it was but inchoate. No doubt it was *contained* in the second codicil, but it was not *made* until the testator's death. The argument is attractive, but takes, I think, too technical a view. "Provision" in the section appears to be used in the second sense mentioned above. The expressions "however worded," "stated amount," "contained in" all seem to point to the language rather than what the language brings about. The Court of Appeal so thought in *In re Waring* (1), and I agree with their view.

(2.) The second question is what is the codicil in which the provision is contained. Originally, no doubt, it is to be found in the second, but that codicil is confirmed by the fourth, and in the end it has to be determined which of the two ultimately "makes" it. The inquiry goes back behind the Wills Act, 1837, to the history of the publication and republication of wills, an expression now meaningless, but still unhappily in use. I do not, however, think it necessary to explore its origin; it is enough to say that there is a series of cases since the Wills Act was passed insisting that, just as the republication of a will substituted the date of the republication for that of the will

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H. L. (E.) before the Wills Act was passed, so afterwards the will spoke from the date of confirmation rather than from that of its original execution, and this result occurred even when there was no express confirmation contained in the codicil, provided the will was referred to and it appeared that the codicil intended to confirm it. To this result it is true there were some exceptions made with the object of preserving the intention of the testator where a strict fulfilment of the general rule would defeat it, e.g., in cases where an exact compliance with the rules would result in the giving of double portions or would defeat a gift to charity which the testator obviously intended to be effective. It may be enough to quote *Grealey v. Sampson* (1) and *Goonewardene v. Goonewardene* (2), as exemplifying the rule, and *In re Fraser* (3), as exemplifying the exception. In the present case, however, there are no facts rendering either of these two exceptions applicable and the general rule that a will or earlier codicil is made at the date when it is confirmed by a codicil of later date must, in my opinion, prevail.

If this view be the true one it disposes of the case, but as further points were fully argued, I think it right to express my present opinion on them. (3.) I think the amount was a stated amount. True it may vary from year to year, but it is calculable once the net sum derived from the previous gifts is known and the tax and sur-tax for the relevant periods are ascertained. (4.) What then is the stated sum? It is, in my opinion, and as the Court of Appeal thought, the amount which the estate has to pay in cash in order to make up the income to 5,000*l.* net. I can perhaps best express my view by saying that where there is a direction in a will to make up *xl.* to *yl.* the stated amount, for payment of which provision is made, is not *yl.* but *yl.* — *xl.* (5.) Finally, it was contended that the codicil was a variation of the provision in the will for payment of a stated amount free of income tax. The Court of Appeal thought not; indeed, they thought that an increase or decrease in the amount would not be a variation. In their view it is the direction to pay free of tax which must be varied in whole or in part. I cannot take that view, but I find the giving of priority over other legacies and of a larger property from which the annuity may be received more difficult to pronounce upon, and until it is necessary to decide the matter I should prefer to withhold my decision.

(1) [1917] 1 Ir. R. 286.

(2) [1931] A. C. 647.

(3) [1904] 1 Ch. 726.

LORD SIMONDS. My Lords, this appeal and cross-appeal raise a number of questions, of which many involve the consideration of facts and documents of some complexity. But the initial and fundamental question is one which can be simply stated and does not admit of much elaboration in answer. All that is involved is the construction of a few words in s. 25 sub-s. 1 of the Finance Act, 1941. That sub-section has already been cited to your Lordships but I will venture for the sake of clarity to repeat it. The material words are: "Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than sur-tax, being a provision which: (a) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract whether oral or in writing; and (b) was made before September 3, 1939; and (c) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is ten shillings in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof." The initial question is whether this section has any relevance in the circumstances.

The section that I have cited operates to reduce the annuities bequeathed to the appellant and the respondent, Miss Jackson (assuming them to be of "a stated amount"), if these conditions are satisfied, (a) that the provision was contained (inter alia) in a will or codicil, (b) that it was made before the war date, and (c) that it was not varied on or after that date. The first condition was clearly satisfied: upon the third I will not at present dwell, though it may have an incidental importance: it is to the second condition that I direct myself, asking the simple question, "Was any provision made for the appellant before the war date?" For the purpose of answering this question I at this stage ignore the fact that the testator by codicils made after the war date confirmed his will and earlier codicils. For Cohen J., who first heard this case, and for the Court of Appeal this question was decided by the earlier case of *In re Waring* (1). In that case Farwell J. decided in a few words that provision is not within the meaning of the section made by a will until the testator is dead, but the Court of Appeal reversing him, held that provision is made at the date of the

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H. L. (E.) testamentary instrument containing the bequest and that it is immaterial when the testator dies. And it is this decision which your Lordships are in the first place called upon to review.

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My Lords, I am of opinion that the decision of the Court of Appeal in *In re Waring* (1) was wrong and that this appeal should therefore be allowed. In that view the other questions, some of them, as it appears to me, not easy of solution, do not arise.

I was much impressed by the point taken by my noble and learned friend Lord Thankerton in the course of the argument and further developed by him in his speech to the House. It is a rule not to be disregarded that a statute applying both to England and Scotland should bear the same meaning in both countries if its language is fairly susceptible of that result. And since it appears to be clear how the law of Scotland would regard a bequest contained in a will dated before the war date by a testator who died after it, I should be disposed to give the same effect in English law to the section if such a result did no violence either to the language of the section or to any principle of law. But, my Lords, I by no means think it necessary to call this rule in aid. For, if I had to interpret this section upon the footing that English and no other law had to be considered, I should with no more doubt or hesitation than I must feel when I differ from the Court of Appeal or any of your Lordships conclude that it can have no application to the case of a testator who survives the war date, whatever may be the date of any will or codicil that he leaves behind him. Ultimately, no doubt, the question whether provision has within the meaning of the section been made before or after a certain date can only be answered by a consideration of the section. It is a matter of construction and nothing else. But I cannot wholly ignore the clear purpose of the section and the circumstances under which the Act was passed. A practice had long grown up by which an annual sum free of income tax, including or excluding surtax, was provided for an annuitant. Unless the provision was made by will, it could only be made somewhat tortuously as, e.g., by the provision of such a sum as after deduction of income tax would leave the required amount, and my own experience, though I would not be dogmatic about it, has been that by far the commonest source of tax-free provision is to be found in wills. The advantage of such a provision is that the recipient obtains a definite annual sum whatever the rate of tax

(1) [1942] Ch. 309, 426.

may be : the disadvantage that an indefinite burden is placed upon the payer or upon the fund out of which the payment must be made. Some increase or reduction of the burden must before the war date have been in the contemplation of any man who bargained to pay, or by his will bequeathed, an annuity free of tax : for changes in the rate of tax were a matter of common experience. But the war brought such changes as it was fair to assume had not been contemplated, the rate of tax rising immediately on the outbreak to a height hitherto unprecedented and continuing to rise. It was under these circumstances that the legislature in 1941 thought fit to make an adjustment of the burden between the payer and payee and did so in the manner provided by the section that I have cited. But, my Lords, nearly two years had elapsed between the war date and the passing of the Finance Act, 1941, and what had happened in the meantime ? There must have been many testators who made their wills before the war date and thereby gave annuities free of tax, who survived the war date and knew of the great increase in the rate of tax (for who is so insensible as to be unaware of it ?) and yet left their wills unaltered and so died. Why should their wishes be overridden ? If a man's wish is that his widow should have a clear annual sum for her support whatever the burden of taxation may be, there is no reason for the legislature to intervene to defeat it. Intervention where a guess may be hazarded what a testator's intention might have been had he foreseen events is one thing, but intervention where those events were before his eyes and he has not changed his purpose is another, and I should not willingly attribute to the section a meaning that had such a result. In the present case the testator survived the passing of the Finance Act, 1941, but, to put it at the lowest, did nothing to suggest that, recognizing the burden of increased tax, he wanted some adjustment made. Indeed everything he did pointed in a contrary direction, but that is another part of the case. It was urged by counsel for the respondents that in such a case a testator must be presumed to know the section (and I suppose any section of any Act that may supersede it) and to be content to leave his will unaltered in the faith that the statute would make the adjustment that he desired of his testamentary disposition. My Lords, is it not the more probable view that he leaves his will unaltered because he does not want to alter it and remains as ignorant of s. 25 of the Finance Act, 1941, as I was until I read the report of *In re Waring* (1), or, likely enough, until the case of *In re*

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Tredgold (1), came before me for decision? If so, what ground again is there for Parliamentary intervention? Here surely is a sphere of conduct in which a man may do what he will with his own. But, my Lords, the question is, as I have said, a question of construction and I will not rely more than is proper upon the background that I have sketched. The question is whether for the purpose of this section provision is made by will for an annual payment when the will is duly signed or when by the death of the testator the will becomes operative. The question here is not when the will was made but when provision was made, a distinction which escaped the notice of the late MacKinnon L.J. and, as I think, led him into error in *In re Waring* (2).

I have pointed out that there are three conditions of the section applying and I think that is significant. The first condition refers to the document or other source of payment, in which the provision is contained: the second to the date when the provision is made. It would have been easy for the draftsman to refer the date to the document and combine the first and second conditions. He did not do so and I think that one good reason for not doing so was that, if he had, the section might have had just the meaning for which the respondents contend. But there would have been this odd result that, whereas in every other case than a provision by will the section would have dealt with rights known to the law which had accrued at the war date, in the excepted case of a provision by will it would have purported to operate on an ambulatory document which had no force or validity whatever at the war date and could have none until the testator died. By introducing the date in a separate condition and providing that the provision in question must be made before a certain date, he postulates of every provision, however made, a common content namely, that it has a legal effect before that date. That the section is not very artistically drawn I would be prepared to agree. In particular little skill is shown in the use of the word "provision." That is a word of diverse meanings which slide easily into each other. It may mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it. Our section opens with the words "subject to the provisions of this section" and in this phrase either or both of the meanings I have given may be

(1) [1943] Ch. 69.

(2) [1943] Ch. 309.

intended. Then comes the phrase "provision however worded," where the first meaning would seem more apt, though the second is well enough. Thirdly, the word is used in the context of (a) "contained," (b) "made" and (c) "varied," and here though either meaning is appropriate to (a) or (c) it is the second meaning only which is appropriate to (b). I have said enough to show that it is not safe to build upon the fine shades of meaning of the word "provision," but the balance is, I think, in favour of giving to the expression "being a provision which "was made before" the second meaning that I have indicated. For one does not speak of "making" a provision, if by provision one means a clause or section. So my Lords, I come back to the simple question, whether provision is made by a testator for his beneficiary until he is dead. I do not doubt that, if asked, he might say he had made provision by his will, e.g., for his wife. It is possible that she, if she knew the contents of his will, might say that he had made provision for her. But this is surely a loose and somewhat elliptical way of saying that, if he died without altering his will, there would be found to be provision made for her. I fail to see how provision can be made, how something can be provided, until there is vested in somebody some right known to the law. Until a testator is dead, the beneficiaries under his will have no better provision than have the next of kin from their still intestate ancestor. In my view the section must be read as dealing not with a *spes successionis* nor with an expectation which rests upon a document liable at any moment to be torn up and having no force in the law, but with rights known to the law and enforceable by one man against another.

My Lords, I said that the third condition, viz., that the provision should not have been varied after the war date, had some significance. The importance of it, I think, is this, that it points to some act by the parties liable to pay and entitled to be paid the annual sum: it assumes rights in existence at the war date and afterwards varied, as e.g., where an annuitant under a will and the residuary legatees agree that in view of the increased rate of tax some adjustment shall be made. I can see no sense or reason in it, if it is applied to the unilateral act of a testator. He is at all times master of the situation: why should application of the section depend on whether he does or does not vary his disposition? I think that the Court of Appeal did not sufficiently notice this aspect of the case. The Master of the Rolls was, logically enough, driven to the view that the section applies even though the testator has after the

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war date confirmed his will, for, as he justly says, if he has confirmed it he has not varied it. With all respect I think that so strange a result might have led him to the view that the section has no relevance except where the variation is of rights accrued by virtue of a provision already made.

Coming to the conclusion that *In re Waring* (1) was wrongly decided and that in this case the section does not apply because the testator survived the war date, I do not think it necessary to say much about the other questions. I would however take this opportunity of correcting what I conceive to be an error in my judgment in *In re Tredgold* (2). The Court of Appeal had in *In re Waring* (1) expressly left open the question whether their decision in that case would be applicable in a case in which the testator had by a codicil made after the war date expressly confirmed his will made before that date. In *In re Tredgold* (2) I decided that it did not. But I do not think that I was justified in so deciding; for in *In re Waring* (1) there had been a republication of the will by a codicil, though it contained no express confirmation of it, and upon further consideration I do not think that there is any valid distinction for this purpose between republication with and without confirmation. I ought therefore to have followed the decision in *In re Waring* (1), in which case *In re Tredgold* (2) might itself have reached your Lordships' House and the decision in *In re Waring* (1) have been corrected at an earlier date. I would however add that, if it were necessary for me in this House to reconsider the effect of a republication of the will after the war date, I should adopt the view taken upon this point by my noble and learned friend Lord Porter, whose opinion I have had the privilege of reading. I will not detain your Lordships by a consideration of the question whether the further dispositions made in regard to the appellant's annuity by the fourth codicil amounted to a variation, so that the operation of the section would in any event be excluded. For, as I have already indicated, the question is for me an unreal one. Upon the final questions raised by the appeal and cross-appeal, whether the provision in the testator's will and codicils was for a "stated amount" and what was the "stated amount" I respectfully adopt the reasoning and conclusions of the Master of the Rolls and cannot usefully add anything. I would allow the appeal and dismiss the cross-appeal.

LORD UTHWATT. My Lords, by the Finance Act, 1941,

(1) [1942] Ch. 426.

(2) [1943] Ch. 69.

passed on July 23, 1941, income tax for the year 1941-42 was directed to be charged at the standard rate of 10s. in the pound for the year 1941-42. By s. 25 of the Act certain annuities expressed to be given tax free were dealt with. It is necessary to quote only s. 25, sub-s. 1, which runs as follows :—" Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than sur-tax, being a provision which (a) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing ; and (b) was made before September 3, 1939 ; and (c) has not been varied on or after that date, shall as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is ten shillings in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof." The arithmetical result is that the gross amount of the sum payable in any year where the standard rate is 10s., is computed as if the standard rate were 5s. 6d.—the rate which obtained in the year 1938-1939. The testator in this case died on January 15, 1942, having by his will dated November 10, 1936, and a codicil dated December 3, 1938, given certain tax free annuities, and having by codicils dated March 9 and September 14, 1940, confirmed his will and former codicils. The first question which arises for decision is whether sub-s. 1 applies to a provision made by a testamentary disposition—assumed for this purpose to be made only by a will dated before September 3, 1939—of a testator who died on or after September 3, 1939. The provision is contained in a will. Was the provision so contained made before that date ?

The sub-section to my mind admits of more than one construction and with Lord Greene M.R. in *In re Waring* (1), I think it permissible to consider the nature of the problem with which the legislature chose to deal. The Master of the Rolls made the following observations :—" It is to be observed that when a testator executes his will he is expressing his intention just as the parties to a deed express their intention, and he knows that the document will have the effect which he intends if he dies the next moment just as much as if he does not die for ten years. Testators making their wills before September 3, 1939, would, ex hypothesi, do so with reference

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“ to a state of facts quite different from that for which s. 25
“ was drafted. If the argument for the annuitant were correct,
“ it would mean that testators who died in the interval between
“ September 3, 1939, and the date when the ten shillings income
“ tax was imposed by the Finance Act, 1941, would, at their
“ peril, have had to make new wills or codicils in contemplation
“ of this exceptional rise in tax. It seems to me that the legis-
“ lature cannot have imputed it to testators that they would
“ make provision for subsequent legislation at the time when
“ they made their wills. What happened was that, testators
“ having made their wills, the legislature intervened and
“ adjusted the burden between the classes of persons benefiting
“ under the wills. I see no reason why the legislature should
“ have dealt with the matter in the way in which the annuitant
“ claims here, but I can see many excellent reasons why it
“ should not. That makes it easier for me to accept what, in
“ my view, is the clear *prima facie* meaning of this language.”
I find myself unable to agree with this method of approach in
an effort to ascertain the general intention of the legislature or
with the conclusion at which the Master of the Rolls arrived.
The position dealt with by s. 25 was the existence of instruments
providing for tax free annuities. The standard rate of income
tax might at the beginning of the war be expected to rise during
its continuance. The section proceeds on the footing that
prior to September 3, 1939, parties would not envisage the
possibility of the standard rate of income tax rising to 10s. in
the pound. Their assumed intentions on that basis were not to
be disappointed. But on and after September 3, 1939, so far
as income tax was concerned, parties ordered their affairs at
their own risk. The obligor is held to a bargain made on or
after that date. What consistently with the rule laid as respects
obligors is the treatment one might expect to be accorded
to persons living on September 3, 1939, who have prior to
that date made a will or codicil giving a tax free annuity?
Under the Act the question whether those persons did or did
not survive its passing is immaterial. On one view the
testamentary instruments of all such persons are to be affected
by the Act; on the other view these testamentary instruments
are to be left to mean what they say. Which of those views
might one naturally expect the legislature to intend and
express? The latter is, I think, the natural alternative to
adopt. The testator who is alive at the war date has the right
freely to alter his testamentary dispositions. The result of the

Act in the cases to which it applies is to alter the operative effect of freely expressed intentions on a matter not contrary to the public interest. To my mind it would be wrong in these circumstances to impute to the legislature any intention to go beyond the necessities of the case. If the language of the section so admits the section should therefore in my opinion be construed as dealing only with an untoward situation which the interested parties could not be expected to consider and deal with. And the line was drawn at September 3, 1939. Why as regards a person living on that date, able freely to deal with the matter as he thought fit, and having the same prescience as to the future course of events as a contracting party, should it be imputed to the legislature that its intention was to disturb an arrangement he had chosen to maintain and force upon him an artificial scheme? He does not need help. Why thrust it upon him? He, if so minded—a common form is ready to hand in the books of precedents—could completely cover the ground by providing for any and every change in the rate of tax.

Nor does a consideration of the subject matter dealt with suggest any special need for intrusion by the legislature in the case of a testator living on the war date. The contrary indeed appears to be the case. The object of giving an annuity free of tax is to allow the annuitant so much spending money. Solicitude for the welfare of the annuitant and personal interest in him appear from the nature of the gift. Tax free annuities given by a testamentary disposition may be fairly assumed to be at all times well to the forefront of the testator's mind. I am unable therefore to see any good reason why the legislature should regard as needing alteration the testamentary arrangements of testators living at September 3, 1939, in respect of tax free annuities, if no transaction made on or after that date is regarded as demanding interference.

It is for these reasons that I differ from the Master of the Rolls in the passage I have quoted. I venture the comment that in reaching his conclusion the Master of the Rolls took into account only testamentary dispositions and that a conclusion embracing cases where the testator survives the date of the passing of the Act is reached by considering only the case of a testator who did not so survive. To this it might be added—not by way of comment—that if *In re Tredgold* (1) were rightly decided, the Master of the Rolls's conclusion as to the intention

(1) [1943] Ch. 69.

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One further general observation may be made. Testamentary instruments appear in sub-s. 1, in the middle of a list of other instruments all of which were in effective operation on September 3, 1939, and the section applies in the same way as respects the effect of the "provision" whatever be the character of the instrument in which the "provision" is contained. The general lay out of the section as well as the substance of the matter suggests that the legislature was dealing with a closed series of transactions, involving therefore only the testamentary dispositions of testators who died before the war date.

My Lords, in my view the word "provision" in an ambiguous word. It may mean the clause in the instrument; the word "provision" in the phrase "subject to the provisions of this section" appearing in the forefront of the section may have that meaning. But the word may also mean the subject matter resulting from the legal operation of a clause conferring a benefit, and when it is used in that sense the phrase commonly adopted in describing the act done is "provision has been made." The ambiguity in the word "provision" arises from the fact that when it is sought to describe generally provisions in the latter sense resort must be made to the source from which they spring namely provisions in the former sense. In my opinion the word "provision" in sub-s. 1 is used in the latter sense. Read in that sense throughout the section I find no difficulty in giving a sensible meaning to all parts of the section without putting any gloss on any other words appearing in it. One qualification only needs to be made to this statement namely that the word "provision" where secondly used in sub-s. 5 (b) is used in the former sense. But this, though relevant, is by no means decisive. Against this exceptional use there may be set the fact that the use of the phrase in sub-s. 5, "This section shall not . . . (c) apply to the emoluments of any office . . . or (d) apply to any dividends or shares of profits"—the section be it remembered applies to a provision—goes on the footing that "provision" means the thing provided, not the source from which the thing is provided. In support of my view some other matters may be referred to.

There is first the outstanding fact that the critical date is attached to the provision made—not to the document in which it is contained. That I do not take to be a draftsman's slip. Second I attach importance to head (c) of sub-s. 1—the provision is to be one which “has not been varied on or after that date” Generally speaking variations are made in the effect of a clause not its terms and, leaving aside the disputed case of testamentary instruments, it would be only the effect—not the language—of a clause that would excite the attention of interested parties. Again head (c) must receive the same construction whatever be the instrument in which the provision is found. Among the instruments mentioned is an Act of Parliament. A provision in the former sense contained in an Act of Parliament can be varied only by another Act of Parliament (I leave out of consideration the exceptional case where the Act provides some other means of variation). An agreement between the parties interested would however be effective to vary a “provision” contained in an Act of Parliament in the latter sense. I do not conceive it to be possible that the section in such a case was intended to apply whatever the parties interested agreed unless there had been another Act of Parliament. Why should they not be free to make their own bargain? Provision in the latter sense must therefore have been intended. If this be the meaning of the word “provision” it follows that there is no provision made by a testator until he dies and his will becomes an instrument having an operative effect in law. The Act accordingly does not in my opinion apply to the testamentary dispositions made by Lord Berkeley. I would add that I am in complete agreement with the view expressed by my noble and learned friend Lord Thankerton that the presumed intention of the legislature in a taxing Act is that the incidence of taxation should be the same in England and in Scotland with the consequence that if a taxing Act is reasonably capable of two constructions, one leading to equality of incidence in the two countries and the other to inequality, the former construction should be adopted.

My conclusion renders it unnecessary to express any opinion upon the other points which were argued. I content myself with saying that I agree with the views expressed by the Master of the Rolls in reference to “stated amount” and that, if the view which I take as to the meaning of “provision” is correct, the observations made by the Master of the Rolls on

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H. L. (E.) the question of "variation" need reconsideration. I would allow the appeal and dismiss the cross-appeal.

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Appeal allowed and cross-appeal dismissed.

Solicitors for appellant : *Field Roscoe & Co.*

Solicitors for the Berkeley respondents : *Garrard, Wolfe & Co.*

Solicitors for the respondent Sybil Jackson : *Culross & Co.*

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[HOUSE OF LORDS.]

May 6, 7, 8,
9, 10;
July 4.

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*Criminal law—Murder—Provocation—Wife's confession of adultery—
Not sufficient provocation to reduce killing from murder to
manslaughter.*

In no case, save in circumstances of the most extreme and exceptional character, can words alone, even a confession of adultery, amount to sufficient provocation to reduce an offence which would otherwise be murder to manslaughter.

The doctrine relating to provocation depends on the fact that it may cause a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or inflict grievous bodily harm, is negatived. Unless, in any case of felonious homicide, the view might fairly be taken (a) that a reasonable person in consequence of the provocation received might be so rendered subject to loss of control as to be led to use the violence inflicted with fatal results and (b) that the accused was in fact acting under the stress of such provocation, it should not be left to the jury to determine whether murder or manslaughter is the appropriate verdict but the judge should direct them as a matter of law that the evidence does not support a verdict of manslaughter.

Dictum in *R. v. Rothwell* (1871) 12 Cox C.C. 145, 147, disapproved.
Decision of the Court of Criminal Appeal affirmed.

APPEAL from the Court of Criminal Appeal.

The facts, stated by VISCOUNT SIMON, were as follows :
The appellant was charged with murdering his wife and was

* *Present* : VISCOUNT SIMON, LORD MACMILLAN, LORD PORTER,
LORD SIMONDS and LORD DU PARCQ.

convicted of this crime at Nottingham Assizes, at a trial before Charles J. and a jury, on February 28, 1946. On his applying to the Court of Criminal Appeal for leave to appeal against this conviction, that court (Lord Goddard C.J., Wrottesley and Croom-Johnson JJ.) treated his application as the actual appeal and dismissed it for the reasons given in a judgment read by Wrottesley J., on April 5. On April 12, the appellant obtained from the Solicitor-General (who was acting in place of the Attorney-General under the Law Officers Act, 1944) a certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that it was desirable that a further appeal should be brought to the House of Lords. The point of law was whether Charles J. was right in telling the jury that, on the evidence at the trial, and having regard to the law, it was not open to the jury to find a verdict of manslaughter and that the statement by the accused's wife to him that she had been unfaithful to him was not such provocation as could justify a verdict of manslaughter instead of murder.

The appellant killed his wife, according to his own evidence, on the night of Sunday or in the early hours of Monday, November 18 or 19, 1945, in the kitchen of the house where they lived. On the previous Saturday he had telegraphed to a Mrs. X., who lived in a different part of the country and with whom he admitted that he had previously had sexual relations, that she might expect him on the Sunday or Monday; he travelled on the Monday to Mrs. X. and told her that his wife had left him. In fact, his wife's dead body was discovered next day in the room where he had killed her. She had received a severe wound on the head caused by the hammer-head for breaking coal which was close to his hand, and she had many bruises on her body, but the final cause of death was manual strangulation. The appellant's story was that there was a quarrel between them on the Saturday night, originating from some persons winking in the direction of his wife in a public house that evening; he said that he had entertained suspicions of his wife's conduct with regard to other men in the village, and that there had been some suggestion made to him with regard to her and his own younger brother. The quarrel, he said, culminated in his wife saying, "Well, if it will ease your mind, I have been untrue to you," and she went on, "I know I have done wrong, but I have no proof that you haven't—at Mrs. X.'s." "With this," the appellant's statement

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continued, "I lost my temper and picked up the hammer—head and struck her with the same on the side of the head. "She fell on her knees and then rolled over on her back, her "last words being, 'It's too late now, but look after the "children.' She struggled just for a few moments and I "could see she was too far gone to do anything. I did not like "to see her lay there and suffer, so I just put both hands round "her neck until she stopped breathing, which was only a "few seconds." In the witness-box, the appellant was asked in cross-examination, "When you put your hands round that "woman's neck and gave pressure through your fingers, you "intended to end your wife's life, did you not?" and he answered "Yes." There was no corroboration at the trial to support the appellant's statement that his wife admitted her unfaithfulness.

Sandlands K.C. and *Elizabeth Lane* for the appellant. If the argument for the appellant prevails a verdict of manslaughter should be substituted for that of murder. The House would have jurisdiction to quash the conviction of murder and remit the case to the Court of Criminal Appeal and that court would treat the case as one of manslaughter: Criminal Appeal Act, 1907, s. 5, sub-s. 2; *R. v. Prince* (1); *R. v. Roberts* (2), and *R. v. Ball* (3). The wife's confession temporarily deprived the appellant of self-control and all his acts, including the pressing of her neck, were part of that same loss of self-control. It was for the jury to say whether there was a loss of self-control and, if so, how long it lasted. The effect of such a confession cannot be timed with a stop-watch. Malice aforethought, essential to the crime of murder is established by proving that the act was done intentionally and was not provoked; it is disproved by showing that the act was not done intentionally and was provoked. If there is a doubt whether the act was intentional or whether it was provoked the jury should acquit of murder. The word is used in the sense in which "provocation" was used in *Mancini v. Director of Public Prosecutions* (4), viz., something resulting in a reasonable man being temporarily deprived of his powers of self-control. There was in this case such provocation as is recognized by law. [They referred to

(1) (1941) 28 Cr. App. R. 60,
64; 58 T. L. R. 211, 22.

(2) (1942) 28 Cr. App. R. 102,
110, 111; 58 T. L. R. 128, 129.

(3) [1911] A. C. 47, 72.

(4) [1942] A. C. 1.

Blackstone's Commentaries, Book IV., pp. 190-1; *R. v. Morley* (1); *R. v. Royley* (2); *R. v. Pearson* (3); *R. v. Errington* (4); and *R. v. Sherwood* (5).] In *R. v. Rothwell* (6) the issue of manslaughter was left to the jury. There the alleged provocation was a wife's confession of adultery. Several blows were struck by the accused, and suspicion had been aroused long before the attack. The test put by the judge was whether the provocation was such as would be calculated to affect an ordinary reasonable man. Accordingly the decision was in a sense a forerunner of *Mancini v. Director of Public Prosecutions* (7). *R. v. Jones* (8) was a case of a killing on a sudden confession of adultery. *R. v. Birchall* (9) was a case of the accused's unfounded suspicion of adultery between his wife and his brother leading him to kill his brother: see also *R. v. Alexander* (10). In *R. v. Palmer* (11) the court declined to extend the doctrine of provocation to the killing of a fiancée and in *R. v. Greening* (12) the court declined to extend it to the case of unmarried persons living together: see also *R. v. Ellor* (13); *R. v. Phillis* (14); *R. v. Hall* (15) and *R. v. Kirkham* (16). *Woolmington v. Director of Public Prosecutions* (17) dealt only with a case where at the end of the evidence the jury were left in honest doubt whether or not there was provocation; it did not deal with the question what constituted provocation. Just as negligence depends on circumstances so does provocation. Nothing can justify the court in laying down a rule for all time, since what may provoke one generation may not provoke another. Whether or not there is provocation is a question of fact. The only test that can be safely laid down so as to apply to all the cases of changing morals and manners is the test laid down in *Mancini v. Director of Public Prosecutions* (7). That case further decided that wherever there was evidence on which a jury could say that they were in doubt whether or not the act was provoked the issue should be left

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| (1) (1666) 6 St. Tr. 769, 771; | (10) (1913) 9 Cr. App. R. 139; |
| Kel. J. 53, 55. | 109 L. T. 745. |
| (2) (1612) Cro. Jac. 296. | (11) [1913] 2 K. B. 29. |
| (3) (1835) 2 Lewin C. C. 216. | (12) [1913] 3 K. B. 846, 849. |
| (4) (1838) 2 Lewin C. C. 217. | (13) (1920) 15 Cr. App. R. 41; |
| (5) (1844) 1 Car. & K. 556. | 90 L. J. (K. B.) 218. |
| (6) (1871) 12 Cox C. C. 145. | (14) (1916) 32 T. L. R. 414. |
| (7) [1942] A. C. 1. | (15) (1928) 21 Cr. App. R. 48; |
| (8) (1908) 72 J. P. 215. | 140 L. T. 142. |
| (9) (1913) 9 Cr. App. R. 91; | (16) (1837) 8 Car. & P. 115. |
| 109 L. T. 478. | (17) [1935] A. C. 462, 472, 480. |

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to the jury. The present was such a case as that. Wherever either spouse has made a confession of adultery to the other, even without any attendant circumstances of further aggravation, it is for the jury to say whether there was sufficient provocation. There are really two questions for the jury: (a) Would a reasonable person so lose self-control as to act as the accused did? and (b) Had the accused so lost control when he did the act in question? The matter should be left generally to the jury with the guiding principle laid down in *Mancini v. Director of Public Prosecutions* (1). It is safer to trust to the good sense of ordinary reasonable men than to attempt to limit the operation of the principle by excluding certain matters as matters of law. [They referred to *R. v. Roberts* (2) and *R. v. Tompson* (3).]

Elizabeth Lane following. One must distinguish, at any rate historically, between two kinds of provocation (a) a blow or insulting words, and (b) the discovery of a spouse's adultery. The earlier authorities drew a clear distinction between them. As to the latter, on the authorities it was to be treated as such that it might reduce a killing from murder to manslaughter, provided there had been no time for cooling, even though the fatal blow was struck with intent to kill. That was the law until *Mancini v. Director of Public Prosecutions* (1), which now governs the matter. [She referred to Blackstone's Commentaries, Book IV., p. 191; *R. v. Mawgridge* (4); *R. v. Manning* (5), and *R. v. Birchall* (6).] It is still the law that the fact that there was an intent to kill does not destroy the right of the jury to find a verdict of manslaughter. What the appellant did does "bear a reasonable relationship to the provocation" afforded by a discovery of adultery, using "discovery" in its wide sense, so as to come within *Mancini v. Director of Public Prosecutions* (7). The jury should have been directed according to the law laid down in that case. Even if *R. v. Rothwell* (8), followed in *R. v. Jones* (9), governs this case the judge should still have left the question of provocation to the jury. In *R. v. Jones* (9) it

(1) [1942] A. C. 1.

(2) (1942) 28 Cr. App. R. 102,
107; 58 T. L. R. 138.

(3) [1943] K. B. 650.

(4) (1706) 17 St. Tr. 57; Kel. J.
119.(5) (1671) T. Raym. 212; (sub
nom. *R. v. Maddy* 1 Vent. 158;
2 Keb. 829).

(6) 9 Cr. App. R. 91, 93; 109

L. T. 478.

(7) [1942] A. C. 1, 9.

(8) 12 Cox C. C. 145.

(9) 72 J. P. 215.

must be assumed that there was an intent to kill. In *R. v. Palmer* (1) the decision in *R. v. Rothwell* (2) seems to have been treated on the basis that a sudden confession of adultery is equivalent to the discovery of the act itself. Further, the court was not bound to believe the appellant's evidence that he strangled his wife to spare her suffering. He may have thought ignorantly that a "mercy killing" was a good defence. See *R. v. Hopper* (3).

Sir Frank Soskice S.-G., Hawke and Winn for the Crown. The question is whether there is any exception to the general rule that words can never constitute sufficient provocation to reduce to manslaughter what would otherwise be murder—see *R. v. Rothwell* (2)—and if there be any such exception, what are its precise limits. Words alone can never in law amount to a sufficient provocation so to reduce killing to manslaughter, when the act is done with an intent to kill. It would be in the highest degree unfortunate if, among returning soldiers, there should be a general impression that on a confession of adultery by a spouse there is something like a licence to kill. The Crown relies on the following propositions: (1.) Whatever the law of provocation is, confessions of adultery stand on exactly the same footing as other types of provocative conduct; they are not exceptions to the general rule and do not fall into a particular category. (2.) The law of provocation is that killing is manslaughter if both the following conditions are fulfilled: (i.) The accused was subjected to provocation which would have provoked a reasonable man to do what he did with the intention that he had in doing so or, if he had no intention or an incompletely formed intention, with that degree of disregard of the consequences of his action; and (ii.) he did the act with that intention in consequence of the continuing influence of that provocation, it having continued to influence him up to and including the time when he did the act. Accordingly, one must ask what he intended in doing the act which killed and, having ascertained that, one must ask whether the provocation, in whatever it consisted, was such as would have provoked a reasonable man to do that thing with that intention and whether he did it under the continuing unspent force of that provocation. This involves the "cooling off" doctrines, since (a) if there was time to cool off, the provocation was not such as would have caused a reasonable man to do that thing

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(1) [1913] 2 K. B. 29, 31.

(3) [1915] 2 K. B. 431, 435.

(2) 12 Cox C. C. 145.

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with that intent, and (b) if the accused did cool off he did not act under the influence of that provocation. (3.) As between the judge and the jury, (i.) it is for the jury to say, subject to matters to be hereafter mentioned, whether the provocative conduct alleged was such as would provoke a reasonable man, in the sense already indicated; (ii.) they must clearly decide whether, assuming there was such provocation, the accused was in fact provoked, in the sense already indicated, up to and including the time of the commission of the act; (iii.) it is for them to find the facts as to the act and the intention. However, with regard to point (i.), this is subject to certain propositions of law which are solely for the judge: (a) The sight of adultery committed by his wife would provoke a reasonable man. (b) Words alone cannot ever be sufficient to provoke a reasonable man to form a fixed intention to kill, or possibly to cause grievous bodily harm, though this should, perhaps be qualified by adding "except in very special circumstances of aggravation." (c) Nothing but the most compelling provocation could ever provoke a reasonable man to the intention to kill. Therefore, a judge, when charging a jury, must ask himself first whether any of these propositions is applicable and, if so, must follow them and decide whether the conduct relied on by the defence would, in the particular case, influence a reasonable man to the act and intent in question. If there is no such proposition applicable, he must, provided always that there is evidence on which a reasonable jury could so find, direct the jury that they must answer for themselves the following questions: (a) What was the act done and the intention with which it was done by the accused? (b) Was there conduct, of whatever kind, which would have provoked a reasonable man to do what the accused did? (c) Was the accused provoked by this conduct to do what he did with that intention? In general, in cases where the act done is consistent only with an intention to kill—as in *R. v. Jones* (1)—then if what is urged as provocation is words alone, the judge should rule that there is no ground for a finding of manslaughter. In cases where there is less than an intention to kill, the judge should rule to the same effect if the evidence of provocation is so unsubstantial that a reasonable jury could not hold that it could have induced a reasonable man to do what the accused did. It is an irrebuttable presumption that mere words can never be sufficient provocation to produce an intention to kill. [They referred to

(1) 72 J. P. 215.

Hale's Pleas of the Crown (Emlyn ed.), vol. I., pp. 455 and 486; Foster's Crown Cases, pp. 290 and 296; Hawkins' Pleas of the Crown, ss. 32, 34 and 36; East's Pleas of the Crown, vol. I., p. 233; *R. v. Morley* (1); *R. v. Mawgridge* (2); *Woodhead's case* (3); *R. v. Kelly* (4); *R. v. Noon* (5); *R. v. Welsh* (6); *R. v. Smith* (7); *R. v. Mason* (8); *R. v. Gauthier* (9); *Kwaku Mensah v. The King* (10); *R. v. Lesbini* (11); Stephen's Digest of the Criminal Law, arts. 316-7 and Stephen's History of the Criminal Law in England, vol. III., p. 81.] Until *R. v. Rothwell* (12) it was not suggested that any special quality attached to confessions of adultery. That decision was wrong and so was *R. v. Jones* (13). *Mancini v. Director of Public Prosecutions* (14) did not purport to change the law and it was made clear by that decision that, if the evidence at the end of a case did not contain material on which a jury could find sufficient provocation, it was the duty of the judge not to leave that issue to the jury. There was no such material in the present case. Words, whether an insult or an admission of adultery, never constitute provocation as contended by the appellant. *R. v. Rothwell* (12) and such cases as *R. v. Palmer* (15) should be overruled. Even if it be held that a confession of adultery is not "mere words", it was still open to the judge in this case to rule that the appellant's acts were not such as a reasonable man would have resorted to in the circumstances. In the present case the judge directed the jury correctly. Blackburn J. ought to have taken the same course in *R. v. Rothwell* (12).

Elizabeth Lane in reply. In the future there will certainly be ordinary reasonable men in this country who will hear confessions of adultery from their wives and some of them will be so deprived of self-control that they will kill them. If the contentions of the Crown are right they will be bound to be convicted of murder, even though they may have been in the state of mind which the law in the past has allowed may reduce killing from murder to manslaughter. But the question of deprivation of self-control is one of fact for the jury: see *Kwaku Mensah*

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(1) 6 St. Tr. 769, 771; Kel. J. 53, 55. (8) (1912) 8 Cr. App. R. 121, 125.

(2) 17 St. Tr. 57, 66; Kel. J. 119, 130. (9) (1943) 21 Cr. App. R. 113.

(3) (1827) 1 Lewin C. C. 60. (10) [1946] A. C. 83, 93.

(4) (1847) 2 C. & K. 814. (11) [1914] 3 K. B. 1116.

(5) (1852) 6 Cox C. C. 137. (12) 12 Cox C. C. 145.

(6) (1869) 11 Cox C. C. 336. (13) 72 J. P. 215.

(7) (1866) 4 F. & F. 1066. (14) [1942] A. C. 1, 12.

(15) [1913] 2 K. B. 29.

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v. *The King* (1). If it were the law that a confession of adultery could not be treated as such provocation, that would not act as a deterrent to killing in these circumstances, for the whole basis of the defence of provocation is loss of self-control. The death penalty may deter one planning a killing in cold blood but not a man in a state of frenzy. It is not necessary to depart from the general rule that words cannot amount to provocation but the view expressed in *R. v. Palmer* (2) that a confession of adultery amounts to a discovery of the act should prevail. *Mancini v. Director of Public Prosecutions* (3) is wide enough to cover all questions of provocation. The fact that this appellant had himself been unfaithful would involve no extension of *R. v. Rothwell* (4) since there is nothing to show whether or not the accused in that case had been unfaithful. That decision should be followed. A judge should be very slow to take on himself to decide what a reasonable jury would find a reasonable man would do. The right of the accused to have his case determined by a jury should depend as little as possible on the personal views of a particular judge.

THE HOUSE dismissed the appeal.

July 4. Their Lordships delivered their reasons.

VISCOUNT SIMON. My Lords, the point of law in this appeal is whether Charles J. was right in telling the jury that, on the evidence at the trial, and having regard to the law, it was not open to the jury to find a verdict of manslaughter, and that the statement by the accused's wife to him that she had been unfaithful to him was not such provocation as could justify a verdict of manslaughter instead of murder. More generally, the question we have to consider is what are the respective functions of judge and jury in such cases, and how the law draws the line between instances of provocation which would, and those which cannot, make it proper for the jury to be left to decide on the facts on the appropriate verdict. There was no corroboration at the trial to support the accused's statement that his wife admitted her unfaithfulness, but for the purpose of deciding whether Charles J.'s direction to the jury was correct, it must be assumed that she did, and that either her confession or her pertinent inquiry about his own misconduct provoked

(1) Ante p. 83, 93.

(2) [1913] 2 K. B. 29, 31.

(3) [1942] A. C. 1.

(4) 12 Cox C. C. 145.

him to lose his temper. The House was unanimous in holding that the direction given by the learned judge was correct ; there were no circumstances of special aggravation, and confession of adultery, grievous as it is, cannot in itself justify the view that a reasonable man (or woman) would be so provoked as to do what this man did. The House accordingly dismissed the appeal, while taking further time to pronounce upon the more general questions of law and principle discussed in the course of the argument.

In dealing with provocation as justifying the view that the crime may be manslaughter and not murder, a distinction must be made between what the judge lays down as matter of law, and what the jury decides as matter of fact. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to lay emphasis on the importance of considering, where the homicide does not follow immediately upon the provocation, whether the accused, if acting as a reasonable man, had "time to cool." The distinction, therefore, is between asking "Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did ?" (which is for the judge to rule), and, assuming that the judge's ruling is in the affirmative, asking the jury : "Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did ?" and, if so, "Did the accused act under the stress of such provocation ?" *Woolmington v. Director of Public Prosecutions* (1), shows that if the jury, after a proper summing up, entertains a reasonable

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(1) [1935] A. C. 462.

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doubt as to the answer to these questions, it ought to give the accused the benefit of the doubt. *Mancini v. Director of Public Prosecutions* (1), points out the importance of considering the nature of the weapon used in retort—in that instance, Macnaghten J. was held to be justified in excluding the possibility of mere manslaughter when a dagger was employed in resentment to a blow aimed at the accused with a fist, for “the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.” The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognized, viz., the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rule: *R. v. Manning* (2). Blackstone (Commentaries) (Book IV., p. 190) justifies the exception on the ground that “there could not be a greater provocation.” But it has been rightly laid down that the exception cannot be extended, e.g., by Parke B. in *Pearson’s* case (3), where he insisted on the condition of ocular observation. Even if Iago’s insinuations against Desdemona’s virtue had been true, Othello’s crime was murder and nothing else.

Necessary self-defence, or action taken in the necessary defence, for example, of wife or child from outrage or maltreatment, stand apart, as in such cases there is no crime at all committed.

This brings me to the question which, as I understand, was the actual reason why the Law Officer’s certificate was given in this case: viz. whether “mere words” can ever be regarded as so provocative to a reasonable man as to reduce to manslaughter felonious homicide committed upon the speaker in consequence of such verbal provocation. There is nothing in the decision of this House in *Mancini’s* case (4) which was intended to prejudge this question, nor does the decision in fact do so. It is first to

(1) [1942] A. C. 1, 9.

(3) 2 Lewin C. C. 216.

(2) T. Raym. 212; (sub nom. *R. v. Maddy*, 1 Vent. 158; 2 Keb. 829).

(4) [1942] A. C. 1.

be observed that provocation by "mere words" may have more than one meaning. It may mean provocation by insulting or abusive language, calculated to rouse the hearer's resentment. The contrast with provocation by physical attack is obvious. A blow may in some circumstances rouse a man of ordinary reason and control to a sudden retort in kind, but the proverb reminds us that hard words break no bones, and the law expects a reasonable man to endure abuse without resorting to fatal violence. It is in this sense that the constantly repeated statement in the old books that "mere words" (not being menace of immediate bodily harm) do not reduce murder to manslaughter is to be understood. See Hale's Pleas of the Crown (ed. Emlyn) vol. I., 456, citing the resolution of all the judges in 1666 on the occasion of the trial of *Lord Morley* for murder (1); *R. v. Mawgridge* (2); Hawkins' Pleas of the Crown, Book I., ch. 13, s. 33; East's Pleas of the Crown, vol. I., p. 233. There is, however, a different sense which may sometimes attach to the meaning of "mere words," for they may be used, not as an expression of abuse, but as a means of conveying information of a fact, or of what is alleged to be a fact. This must be the sense in which Blackburn J. spoke in *Reg. v. Rothwell* (3), when, in the course of summing up to a jury in the case of a man charged with murdering his wife, he went so far as to say: "As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter." It is to be noted that Blackburn J. said "might," and not "would," and the illustration had no resemblance to the facts of the case he was trying. Blackburn J.'s dictum was applied in the accused's favour in *R. v. Jones* (4), and was not dissented from in *R. v. Palmer* (5), when, however, the Court of Criminal Appeal refused to extend the suggested exception to cover the case of a man engaged to be married to a young woman whom he killed when she confessed to illicit intercourse with someone else. Channell J. in delivering the judgment of the court, said (6)

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(1) 6 St. Tr. 769, 771;

Kel. J. 53, 55.

(2) 17 St. Tr. 57, 66;

Kel. J. 119, 130.

(3) 12 Cox C. C. 145, 147.

(4) 72 J. P. 215.

(5) [1913] 2 K. B. 29.

(6) Ibid. 29, 31.

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that the reason for the exception suggested by Blackburn J. was "that a sudden confession is treated as equivalent to a "discovery of the act itself." In my view, however, a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter. The dictum attributed to Blackburn J. and any cases which seem to accept or apply it, can no longer be regarded as good law. The rule, whatever it is, must apply to either spouse alike, for we have left behind us the age when the wife's subjection to her husband was regarded by the law as the basis of the marital relation, when, as Bracton said (1), she was "sub virga viri sui" and when the remedies of the Divorce Court did not exist. Parliament has now conferred on the aggrieved wife the same right to divorce her husband for unfaithfulness alone as he holds against her, and neither, on hearing an admission of adultery from the other, can use physical violence against the other which results in death and then urge that the provocation received reduces the crime to mere manslaughter. It is not necessary in this appeal to decide whether there are any conceivable circumstances accompanying the use of words without actual violence, which would justify the leaving to a jury of the issue of manslaughter as against murder. It is enough to say that the duty of the judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter, and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violently provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.

There are two observations which I desire to make in conclusion. The first is that the application of common law principles in matters such as this must to some extent be controlled by the evolution of society. For example, the instance given by Blackstone (Commentaries, Book IV., p. 191, citing an illustration in Kelyng p. 135), that if a man's nose was pulled and he thereupon struck his aggressor so as to kill him, this was only manslaughter, may very well represent the natural feelings of a past time, but I should doubt very much whether such a view should necessarily be taken nowa-

(1) Pollock and Maitland's History of English Law vol. II., p. 406.

days. The injury done to a man's sense of honour by minor physical assaults may well be differently estimated in differing ages. And, in the same way, one can imagine in these days at any rate, words of a vile character which might be calculated to deprive a reasonable man of his customary self-control even more than would an act of physical violence. But, on the other hand, as society advances, it ought to call for a higher measure of self-control in all cases. The remaining reflection is as follows: the reason why the problem of drawing the line between murder and manslaughter, where there has been provocation, is so difficult and so important, is because the sentence for murder is fixed and automatic. In the case of lesser crimes, provocation does not alter the nature of the offence at all: but it is allowed for in the sentence. In the case of felonious homicide, the law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty.

My Lords, my noble and learned friend Lord Macmillan authorizes me to say that he concurs in the opinion which I have just expressed.

LORD PORTER. My Lords, I concur.,

LORD SIMONDS. My Lords, I also concur.

LORD DU PARCQ. My Lords, I concur.

Appeal dismissed.

Solicitors for appellant: *Ludlow & Co.*

Solicitor for the Crown: *Director of Public Prosecutions.*

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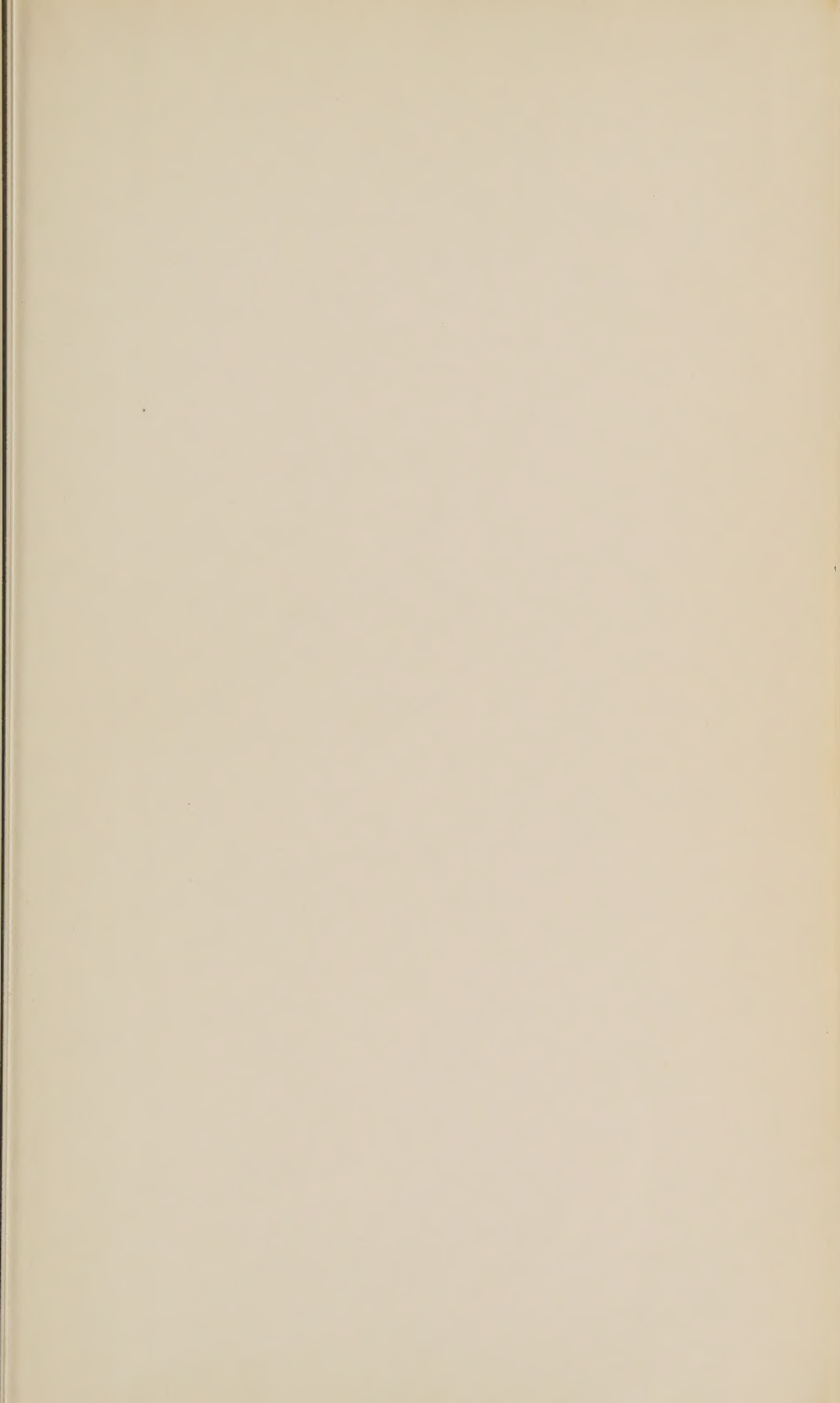
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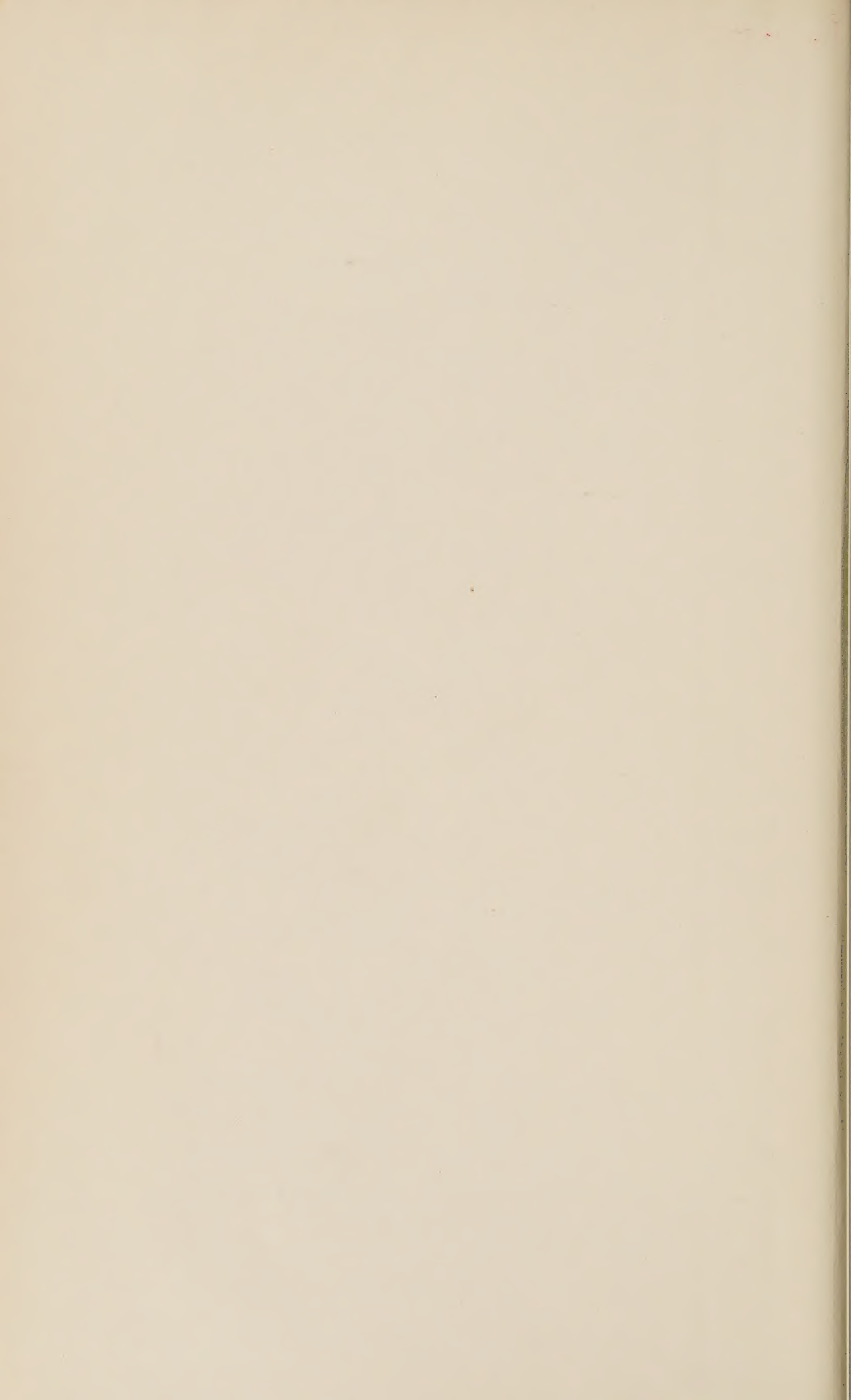
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